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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE NEW YORKER MAGAZINE, INC.,

Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,

Appellees.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

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Appellees.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment and remittitur of the Court of Appeals of the State of New York, entered on July 3, 1957, motion for reargument denied on October 17, 1957, which affirmed an order of the New York Supreme Court, Appellate Division, First Department, confirming a determination of the Comptroller of the City of New York denying appellant's claim for refund and assessing additional New York City gross receipts taxes for the years 1947, 1948 and 1949.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A, *infra*, pp. 27-33) is reported at 3 N. Y. 2d 362. The

opinion of the Appellate Division (Appendix A, *infra*, pp. 33-40) is reported at 2 App. Div. 2d 600.

Jurisdiction

This is a proceeding under Article 78 of the New York Civil Practice Act to review determinations of the New York City Comptroller denying without opinion appellant's claims for refund of City gross receipts taxes for 1947, 1948 and 1949 and assessing deficiencies in such taxes for 1948 and 1949. The judgment of the New York Court of Appeals, affirming a final order of the Appellate Division which confirmed the Comptroller's determinations, was entered on July 3, 1957 (Appendix A, *infra*, pp. 40-41). Appellant's motion for reargument, filed on September 26, 1957, was denied on October 17, 1957 (Appendix A, *infra*, pp. 41-42). Notice of appeal was filed in the Supreme Court of the State of New York, New York County, on January 6, 1958.

The jurisdiction of this Court over this appeal is conferred by 28 U. S. C. §1257(2). Cases sustaining the jurisdiction of this Court on such appeal include *West Point Grocery Co.* v. *Opelika*, 354 U. S. 390; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157; *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

Questions Presented

1. Section 24-a of the General City Law of New York State authorizes any city with a population of a million or more to impose a privilege tax upon persons carrying on a trade, business or profession within the city measured by

gross receipts from such activity "received in and/or allocable to the City * * *." Pursuant to this enabling act, the City of New York enacted Local Law 14 of 1946 (amending Title RR, Chapter 41, Administrative Code) and Local Law 44 of 1948 (adding Title B to Chapter 46 of the Administrative Code). Acting under these provisions of the New York City Administrative Code and under his administrative regulations (p. 55, *infra*), the appellee Comptroller levied a tax on all of appellant's gross receipts from advertising in its magazine (excluding a small portion solicited by out-of-state offices, but including agency commissions and discounts never received by appellant), without allocation for appellant's preponderant out-of-state circulation, other substantial out-of-state activities, including printing and shipping, and out-of-state property. The first question presented is whether the foregoing State and City statutes, as thus interpreted and applied to appellant, violate the Commerce Clause of the United States Constitution.

2. Whether the State and City statutes, as interpreted and applied to appellant, violate the Due Process and Equal Protection Clauses of the United States Constitution (Fourteenth Amendment, §1) on any or all of the following grounds:

(a) Because appellant's gross receipts from magazine advertising are taxed in full while competing media—radio and television stations and other magazines—are taxed on only a portion of such receipts allocated to New York City.

(b) Because allocations of gross receipts taxable in New York are made for other businesses on grounds which are neither specified in the statutes nor justified by any factual differences from appellant, rendering the

denial of such an allocation to appellant arbitrary and capricious.

(c) Because, as the statutes have been construed and applied, they delegate power to the Comptroller of the City of New York, ostensibly guided by the requirements of the Commerce Clause, to effect discriminations against appellant and in favor of other taxpayers similarly situated without justification either in the Commerce Clause or on any other ground.

Statutes and Regulations Involved

Section 24-a of the New York State General City Law, New York City Local Law 14 of 1946, New York City Local Law 44 of 1948, and administrative regulations of the New York City Comptroller under the foregoing statutes are set forth or described in pertinent part in Appendix B, *infra*, pp. 43-57.

Statement

The facts, which are not in dispute, may be summarized as follows:

I. *Appellant's two editions, advertising and circulation.*

Appellant publishes a weekly magazine, The New Yorker, which has appeared since 1929 in two editions. One edition, known as the "city" or "metropolitan" edition, circulates in New York City and 26 neighboring counties in New York, Connecticut and New Jersey. The other, the "national" or "out-of-town" edition, circulates *outside* the area of the

city edition, i.e., to a minor extent in upper New York State but mainly in other parts of the United States and abroad.

The difference between the two editions consists mainly in the advertisements they carry. The bulk of all advertisements in the magazine is national in character. However, the city edition is designed to enable local advertisers to reach the comparatively small audience (see *infra*, pp. 5-6) in New York City and its metropolitan area at rates much lower than those for the vastly larger national edition. Coverage of the national market, including the New York metropolitan area, requires use of both editions, collectively described for purposes of advertising rates as the "entire edition."

Appellant's advertising business is the rendition to its advertisers of a service, i.e., the service of delivering the advertisers' messages to readers all over the world. The advertiser pays appellant for this service. Appellant induces the advertiser to purchase the service by showing the advertiser where throughout the world and to what types of readers his message will be delivered if printed in The New Yorker.

Revised periodically to reflect changes in circulation and other factors, the difference in rates for the "city" and "entire" editions is illustrated in the record by the following comparative charges on two dates for a full-page black and white advertisement:

	Entire Edition		City Edition	
	Guaranteed Circulation	Page Rate	Guaranteed Circulation	Page Rate
5 Oct. 1929	80,000	$ 700	50,000	$500
6 Jan. 1951	290,000	2,075	82,500	825

As these figures illustrate, advertising rates are based upon circulation. The publisher guarantees his circulation

to the advertiser, who receives a specified proportionate rebate when the guaranteed figure is not met. The advertiser pays the excess of the entire edition rate over the city edition rate solely to reach appellant's national edition circulation, substantially all of which is outside New York State.

Implementing this arrangement, the circulation figures of national magazines are closely tabulated, and are analyzed and certified by the Audit Bureau of Circulation ("ABC"), an organization maintained by these magazines. Appellant, a member of ABC since 1925, has its circulation figures regularly compiled, audited, printed and distributed to advertisers and agencies.

The figures show that the bulk of appellant's circulation is national and international rather than local. Over the years in issue (1947-1949), about 70 percent of appellant's circulation and advertising receipts were accounted for by the national rather than the city edition. Over 72% of the magazine's circulation was outside New York State, over 79% outside New York City. Similar percentages of the advertising receipts taxed by the City in this case were attributable to circulation outside the City and State. See Tables, Appendix C, *infra*, pp. 58-60, showing figures and sources in the record.

II. *Appellant's interstate production and distribution activities.*

While the magazine is largely managed and edited from appellant's New York offices, substantial portions of appellant's operations occur wholly outside the State or across state lines. About 49% of appellant's operating expense is incurred through such out-of-state or interstate transactions.

All copies of the magazine, for both editions, are printed at The Conde Nast Press in Greenwich, Connecticut. All the paper on which the magazine is printed is purchased by appellant, shipped directly to Greenwich, and stored there until used. Over 1,000 tons of this paper (2½ months' supply) is kept in stock at Greenwich at all times. Work in process, finished covers, inserts and cuts are stored in Greenwich.

All copies are mailed or shipped from Greenwich, Connecticut, to subscribers, or to vendors for newsstand sale, throughout the country and abroad.

Each issue of the magazine is "put to bed" in Greenwich by a team of five or six of appellant's editors, including the head of the makeup department, who spend a day each week in Greenwich to read proofs, supervise layout and make final changes and corrections. Appellant's editor-in-chief, vice president and other officials regularly spend varying amounts of time at the Connecticut plant in connection with appellant's operations there.

Much of the advertising printed in the magazine is received from outside New York State. From branch offices maintained by or for appellant in Chicago, San Francisco, Los Angeles and Atlanta, appellant's solicitors regularly call on clients and prospects all over the country and abroad. Of the twenty solicitors working from appellant's New York office, four or five spend from 25% to 50% of their time outside the State.

Appellant does not prepare the advertising it is paid to carry. Copy and cuts are prepared and sent in by the advertiser or its agency. These are frequently forwarded to the press unopened, and late material is sometimes sent directly to the printer in Connecticut without passing through the New York office.

A substantial portion of the editorial matter in the magazine is prepared by authors and artists outside New York.

During the typical years in question, almost two-thirds of appellant's property was located outside the State of New York.[1] In addition to its New York bank accounts, appellant keeps accounts in Chicago and in Toronto, Canada.

III. *The administrative rulings and the decisions below.*

The appellee Comptroller denied appellant's objections to the tax under the Due Process and Equal Protection Clauses and rejected the claim that the Commerce Clause requires at least an apportionment of appellant's gross receipts for purposes of the City's tax to reflect (1) the preponderant out-of-state readership which advertisers pay appellant to reach, and (2) the major activities of printing, preparing and publication which are performed by appellant outside the State or across state lines. Instead, the Comptroller ruled that there could be excluded from the taxable gross advertising receipts only some 15%, representing payment for advertising solicited by appellant's out-of-state offices. Offsetting this exclusion, the Comptroller also included 15% advertising agency commissions and the standard 2% 10-day discount, both representing sums never received by appellant, with the result that slightly more than 100% of appellant's actual gross receipts for advertising were held taxable (see pp. 59-60, *infra*).

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[1] The pertinent figures in the record show the following:

	1947	1948	1949
New York Property	$272,148	$328,996	$336,696
Out-of-State Property	583,038	581,547	547,912
Total	$855,187	$910,544	$884,608

Confirming the Comptroller's determination, the Appellate Division concluded that *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, defeats appellant's claim under the Commerce Clause (Appendix A, *infra*, pp. 33-40). The Court of Appeals affirmed on similar reasoning (*infra*, pp. 27-33). Both courts, the latter expressly (*infra*, pp. 32-33), also rejected appellant's arguments that the City tax law, as here applied, violates the Due Process and Equal Protection Clauses.

IV. *Raising the federal question below.*

As we have just noted, appellant presented to the Comptroller and to both courts below its claim that the City's tax statute, as applied in this case, contravenes the Commerce, Due Process and Equal Protection Clauses of the Federal Constitution. The point was raised in pleadings, brief and argument. The opinions below demonstrate that the issue was presented and decided adversely to appellant. See *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182, 185-6, and cases cited.

The Questions Are Substantial

The decision below sanctions an unconstitutional tax burden upon interstate commerce, resulting in a pattern of arbitrary discrimination against this appellant and other publishers of national magazines. The result is squarely contrary to the decisions of this Court in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, and *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650. It rests upon a mechanical and erroneous reading of this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, overlooking the critical points that—

(1) in *Western Live Stock* "[a]ll the events upon which the tax [was] conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—" (303 U. S. at 260) occurred within the taxing state, whereas here most of the same events occur outside the state, and

(2) in contrast with the barren record in *Western Live Stock*, presenting, on a demurrer, the case of a small trade journal with "some" out-of-state circulation, the detailed record here leaves no doubt that the portion of appellant's advertising receipts which we contend the City may not tax stems exclusively from interstate and foreign circulation of its advertisers' messages in a medium printed and shipped from outside the state.

If accepted, the decision below would twist the commerce clause into a vehicle for grossly unequal treatment of the periodical press as against other taxpayers whose practical and constitutional positions are identical. It would, in addition, sanction extension of the states' jurisdiction to tax beyond the limits marked by the due process clause. *Western Live Stock*, viewed in the context of its own facts and the other decisions of this Court, cannot serve to justify such a result. If it did, we respectfully suggest, it would call for further examination by this Court in the light of circumstances of fact and law developed over the intervening twenty years. We submit, in short, that this case presents a substantial occasion for review and guidance by this Court.

I.

The City taxing statute, as here applied, violates the commerce clause.

1. The tax directly burdens unitary interstate activities, not a "local business" in any sense.

Appellant's gross receipts for national advertising in its entire edition derive from activities which are, from first to last, clearly interstate rather than intrastate commerce. As our Statement shows (pp. 4-8, *supra*), no part of these activities—from advertising contract through preparation of the magazine and advertisements to national and international circulation—is localized or isolable in New York. Appellant maintains offices in Illinois, California and Georgia, and bank accounts in Chicago and Toronto; editorial and advertising matter flow in from authors and advertisers throughout the country; the magazine undergoes final revision and is printed in Connecticut, where paper and work in process are stored; the magazines are shipped from Connecticut, without routing through any of appellant's facilities in New York, to subscribers and newsstands all over the country and abroad.

Accordingly, it is even clearer here than it was in *Lorain Journal* v. *United States*, 342 U. S. 143, 151, 152, that appellant's national and international dissemination "of national advertising originating throughout the nation and offering products for sale on a national scale" is "an inseparable part of the flow of * * * interstate commerce * * *." It would seem equally clear, postponing briefly (see pp. 15-22, *infra*) the problem of the *Western Live Stock* decision, that New York's imposition of a tax on the gross receipts derived from this commerce is forbidden by the Constitution.

For the State (or the City under its delegated authority) is forbidden to tax the privilege of carrying on a business which is exclusively interstate commerce—whether the tax be measured by net income, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, by a flat fee, *Memphis Steam Laundry, Inc.* v. *Stone*, 342 U. S. 389, or by gross receipts, *Railway Express Agency* v. *Virginia*, 347 U. S. 359. And it is settled that this prohibition may not be avoided by the attempt to carve out a supposedly "local activity" as a basis for the tax where this activity is "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 166.

These principles govern here. It may be that because no part of appellant's business is localized in New York City it constitutes exclusively interstate commerce. In such event, none of appellant's receipts could constitutionally be taxed. Even if that portion of appellant's receipts attributable to circulation of the magazine within New York—although all issues of the magazine so circulated are printed and published in and shipped from Connecticut—should be deemed to arise from a separable local activity, the immunity from privilege tax of the balance of appellant's gross receipts, which arise exclusively from circulation of the magazine from an out-of-state printing plant to readers in other states and abroad, is not impaired. *Norton Co.* v. *Department of Revenue*, 340 U. S. 534, 539; *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U. S. 90; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 424-5. An allocation to exempt such receipts, denied by the appellees and the decision below, is all appellant has claimed.

The tax upheld by the court below on appellant's advertising receipts from circulation outside New York State

conflicts squarely with the principle laid down by this Court in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438-9:

> "• • • under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it • • • undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state."

Here, the preparation, printing and publication of the magazine all involve substantial activities in more than one state and continuous communication across state lines. The delivery of the advertiser's message, the service for which appellant is paid, is accomplished only by the shipment of the magazines from Connecticut (not New York) to points throughout the country and abroad. If appellant did not represent to its advertisers the nature and extent of its interstate and foreign circulation, the advertising giving rise to the receipts for which we claim exemption would never have been ordered.

The service appellant performs is analogous to that of the taxpayer in the *Gwin, White & Prince* case, which marketed fruit grown in the taxing state to buyers scattered around the country.[2] Here, as in that case, the tax "reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume." *Id.* at 438. Here, as there, the state has transgressed the commerce clause in undertaking "to lay a privilege tax measured by gross receipts derived from activities in such [interstate] commerce which extend beyond the territorial limits of the taxing state." *Id.* at 439.

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[2] The taxpayer in *Gwin* made no allegation that any of its own employees worked outside the taxing state.

Even more closely analogous is the decision in *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650, striking down a state occupation tax in its application to the gross receipts of a radio station for the interstate transmission of advertising programs. What the customer paid for, the Court noted (pp. 652, 654, 655), was the delivery of its advertising message across state lines. The vice of the tax, the Court concluded, was its application to the taxpayer's "gross receipts for the service it perform[ed]," including the "transmission as a means of communication interstate" of the radio waves bearing the advertiser's message. *Id.* at 656.

The applicability of that conclusion here seems plain enough. In reaching that result, the Court referred to the essential similarity between radio and telephone or telegraph, observing (pp. 654-655) that any physical differences among these media were "immaterial in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of 'intercourse' which is commerce." So, too, in the absence of other distinguishing factors, the difference between interstate communication by radio (or television) and interstate communication by written and pictorial messages in a magazine is hardly sufficient to ground a constitutional distinction. Indeed, the present case is in a substantial respect a stronger one against the tax than was *Fisher's Blend*; there, it appears that the activities resulting in the transmission of the message were all performed by the taxpayer within the taxing state, whereas here a large portion of such activities (preparation of material, printing, actual transmission by shipment or mailing) take place outside the state.

It would appear, therefore, under the principles of *Fisher's Blend*, *Gwin, White & Prince*, and other controlling authorities on this problem (e.g., cases cited *supra*,

p. 12), that the New York City gross receipts tax as applied to appellant in this case collides squarely with the commerce clause. However, in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 260-261, upholding the New Mexico tax there involved, this Court distinguished *Fisher's Blend*, and the court below has found *Western Live Stock* decisive in this case. Accordingly, it becomes important to show that the lower court has erred in this respect.

2. This case differs from *Western Live Stock* in (a) the nature of the tax imposed, (b) the facts to which the tax has been applied, and (c) the legal and factual setting in which the problem arises.

a. The tax in *Western Live Stock* was expressly applicable, and there applied, to the wholly local business of selling advertising space in a case where "preparing, printing and publishing magazine advertising" in fact took place entirely within the state. The tax was accordingly sustained as being identical in legal effect with that in *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459—upholding a gross receipts tax on the privilege of manufacturing goods later sold in interstate commerce—since it reached only "the privilege of doing a local business separable from interstate commerce." 303 U. S. at 261.

Here, however, as authoritatively construed and applied by the appellees, the tax is not confined to any such separable local activity as selling advertising space or manufacturing. The New York City tax is a tax for the privilege of carrying on an *entire* business (not a separable local activity), and must therefore be allocated, in accordance with the decisions of this Court, where the business is carried on across state lines. And the City has recognized the need for such an allocation in dealing with businesses other than

national magazines. Thus, as applied to manufacturers who carry on their manufacturing operations within the City but sell outside of it, the tax is confined to only an allocable portion of the receipts, with a maximum of 33⅓% (Appendix B, *infra*, pp. 49-50).

The City says that *American Manufacturing* is not applicable to New York City manufacturers because the New York City tax is different from that involved in *American Manufacturing*.[3] This very difference makes *Western Live Stock* inapplicable to this appellant precisely as *American Manufacturing* is inapplicable to New York City manufacturers.

Both in thei administration of the tax and in their presentation of this case, the appellees have made clear that the tax may not be measured by 100% of gross receipts under the rule of the *American Mfg.* and *Western Live Stock* cases, but is, and must be, allocated to free interstate commerce under the principles appellant has urged. The case is here because appellees, while making the constitutionally required allocation for manufacturers and other taxpayers, have denied it to magazine publishers like the present appellant.

b. As this Court repeatedly emphasized in *Western Live Stock*, the appellants there published a journal "which they wholly prepare[d], edit[ed], and publish[ed] within the state of New Mexico, where their only office and place of business [was] located." 303 U. S. at 252; and see *id.* at

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[3] In their Brief in Opposition to our Motion for Reargument, p. 3, the appellees said: "• • • the United States Supreme Court has said that this case [*American Manufacturing*] is only applicable where the tax is upon the conduct of manufacturing and does not govern a situation [as in the case of the New York City tax] where there is a gross receipts tax on the privilege of doing business. See, for example, *Freeman* v. *Hewit*, 320 U. S. 249, 258 (1946); *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312-313 (1938)."

257, 258, 260. These were the facts, presented only in pleadings, to which the Court addressed itself in concluding that:

(1) "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation" (p. 258),

(2) "[a]ll the events upon which the tax is conditioned—the preparation, printing and publishing of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere" (p. 260), and

(3) the tax "is not measured by the extent of the circulation of the magazine interstate" (p. 260).

Overlooking the constant need to read opinions in the setting of their concrete facts, the lower courts in this case have read the plainly factual observations in *Western Live Stock* as if they somehow establish immutable principles of law. They have held, in effect, that whatever the actual facts may be, they are to be treated for commerce clause purposes as if "preparing, printing and publishing magazine advertising" is always and necessarily "peculiarly local." In this way, the courts below have left wholly out of account the plain fact that the present appellant's *interstate* business of printing and publication is carried on largely outside New York and is not "local" in any sense whatever.

It is in this critical aspect that the facts in this case, developed in a full record, are decisively different from those in *Western Live Stock*. As our Statement shows (*supra*, pp. 6-8), it is undisputed that the national magazine involved here is prepared partly in Connecticut and wholly printed in and distributed from that state. The very paper on which the magazine is printed, never reaching New York except in those magazines sold in that state, is purchased

by appellant and shipped to Connecticut for storage until it is used. Serving a national and international market, appellant has branch offices in Chicago, San Francisco, Los Angeles and Atlanta, and bank accounts in Chicago and Toronto, Canada. The advertising printed in appellant's magazine is largely prepared outside New York State.

In a word, many of the events upon which the tax here is conditioned occur "elsewhere" than in New York. This crucial difference in the facts eliminates any basis for the lower court's treatment of *Western Live Stock* as a controlling precedent. The characterization of appellant's interstate activities as a "local business" is factually groundless. And there is no assurance at all that this appellant is free from potential multiple tax burdens, the absence of which was an important consideration in *Western Live Stock*.

We have shown that *Fisher's Blend* is a square precedent for invalidation of the tax complained of here. The sole ground for distinguishing *Fisher's Blend* articulated in *Western Live Stock* was that there did not exist in the latter a possible multiple tax burden which was present in *Fisher's Blend*.[4] But the multiple burden said to be present in *Fisher's Blend* arose from a tax which had been asserted not against radio broadcasters like the taxpayer there, but against owners of receiving sets—a tax which had already been held invalid under the interstate commerce clause.[5] Thus, to establish a multiple burden here, it would be suffi-

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[4] In *Fisher's Blend* "the exaction was a privilege tax laid upon the occupation of broadcasting. . . . If broadcasting could be taxed, so also could reception. *Station WBT, Inc.* v. *Poulnot*, 46 F. (2d) 671. In that event a cumulative tax burden would be imposed on interstate communication . . ." *Western Live Stock* v. *Bureau*, 303 U. S. at 260-61.

[5] *Station WBT, Inc.* v. *Poulnot*, 46 F. 2d 671 (E. D. S. C. 1931), referred to by this Court in *Western Live Stock*. See preceding footnote.

cient to show that, if there were no interstate commerce clause,[6] there are taxes which could be levied by other states or their subdivisions, not necessarily on appellant, but even on its readers.

Here we need not rely on the possibility of such a disconnected burden. For it is clear that if the commerce clause leaves New York City free to levy this tax, then it leaves appellant also subject to similar taxation in each state where sales offices are maintained by or for appellant,[7] in each state where appellant's salesmen regularly and intensively solicit advertising,[8] and, since appellant's contract for the newsstand distribution of its magazines may be regarded as one of agency, in each state where appellant would thus be engaged in the business of selling its magazines at retail newsstands.[9] Finally, as the court below was informed, Connecticut has claimed the right to impose a repetitive franchise tax reaching appellant's editorial, printing, storage and distribution activities in that state.[10] The claim is pending administrative consideration as this is written.

In *Western Live Stock* it was not alleged that there were printing, editorial, storage and distribution activities in

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[6] *Western Live Stock* v. *Bureau*, 303 U. S. at 260; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438-39; see discussion of *Adams* case by Mr. Justice Rutledge, concurring in *Freeman* v. *Hewit*, 329 U. S. 249, 274-6.

[7] *Field Enterprises, Inc.* v. *Washington*, 352 U. S. 806; *Minnesota* v. *Northwestern States Portland Cement Co.*, 84 N. W. 2d 373 (Minn.), probable jurisdiction noted, 78 S. Ct. 341.

[8] *Walter T. Dickerson Co.*, 1 C.C.H. Cal. Tax Cases ¶200-245 (State Board of Equalization, 1953); cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 321.

[9] Cf. *Frank Handfield*, 23 T. C. 633.

[10] Cf. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, as applied in *Reynolds Tobacco Co.* v. *Carson*, 187 Tenn. 157, 213 S. W. 2d 45.

other states, as there are in Connecticut here; nor that there were sales offices in other states, as there are in Illinois, California and Georgia here; nor that there was regular and intensive solicitation of advertising by salesmen in other states, as there is in numerous states here; nor that there were any sales at newsstands, as there are in all the 48 states here. These factors subject appellant to the potential multiple tax burden which was absent in *Western Live Stock*. They make inapplicable here the sole distinction from *Fisher's Blend* expressly adverted to in *Western Live Stock*. They render the tax here invalid under the rule of *Fisher's Blend*.

c. The factual and legal setting of the present case differs markedly from that of *Western Live Stock*. Arising upon a demurrer, the record there presented in a general way the case of a small publication, locally produced, involving only "to some extent the distribution, interstate, of some copies of the magazine." 303 U. S. at 254. Observing that the tax there involved was measured by gross receipts which were merely "to some [unspecified] extent augmented by" interstate circulation (*ibid.*), this Court found the burden upon interstate commerce "too remote and too attenuated" to be objectionable (*id.* at 259; see also pp. 257, 260).

Here, on the other hand, the denial of the allocation appellant claims results in a tax of which the objectionable portion is measured wholly by receipts attributable to interstate circulation. Here, on a detailed record, appellant has demonstrated that a segregated and identified portion (over 72%) of its advertising receipts relate directly and exclusively to circulation outside New York City and State—i.e., circulation of magazines printed in and shipped from Connecticut to places outside of New York. Since appellant has two editions, and an advertiser can reach substantially all appellant's New York circulation by advertis-

ing in the city edition, the excess of the entire edition over the city edition rate is paid by advertisers solely to reach the interstate and foreign circulation of appellant's magazine. Thus, the record here establishes incontrovertibly that, contrary to the express grounding of the *Western Live Stock* decision, the tax, based on the price of advertising, is directly "measured by the extent of the circulation of the magazine interstate." 303 U. S. at 260. The question here is not as to a tax on gross receipts from a "local business," with some incidental "value contributed" by interstate activity. 303 U. S. at 260. Instead, the significantly different question relates to a tax of which the entire incidence is upon receipts from interstate activity.

In this case, moreover, the full record renders impossible the distinction between "interstate communication" by radio and such communication by magazine—a distinction found acceptable in *Western Live Stock* on a barren record which did nothing to impair it. See 303 U. S. at 260-61. In this case, the evidence leaves no doubt that interstate magazines compete directly with interstate radio broadcasters for the custom of those who pay to have their advertising messages delivered. However disfavored the written word may have seemed to become in terms of public preference, the record of this case leaves no ground for treating it as constitutionally different from or inferior to the messages of radio and television.

It should be emphasized, finally, that *Western Live Stock* rested upon the basic premises that

(1) the interstate formation of contracts "is not within the protection of the commerce clause" (p. 253), citing *Paul v. Virginia*, 8 Wall. 168; and

(2) the preparation, printing and publishing of advertising received and disseminated interstate is a "local" activity, taxable as such.

The first of these premises was removed by *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533; see *Lorain Journal* v. *United States*, 342 U. S. 143, 151-2. The second, if it remains vital at all following *Lorain Journal*, may be applicable to the kind of locally printed journal involved in *Western Live Stock*—a "newspaper," as this Court has since called it in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 610—but cannot be thought realistically to cover the wholly different facts of this case.

We submit, in sum, that in its reliance upon *Western Live Stock*, the court below overlooked the "abstract form" [11] in which that case was here, and read the opinion without regard to the facts (or lack of facts) upon which it was predicated. As this Court has observed, it is especially true of the problem under consideration that "in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." *Freeman* v. *Hewit*, 329 U. S. 249, 252. Overlooking, not merely the "nice distinctions" which must be observed in this area (*McLeod* v. *Dilworth Co.*, 322 U. S. 327, 329), but major differences of fact, the New York courts have read *Western Live Stock* as a discordant precedent justifying a unique erasure of the commerce clause for the special case of national magazines.

3. As construed by the court below, *Western Live Stock* would permit arbitrary discriminations among taxpayers similarly situated.

Apparently resting upon a pervasive misconception of commerce clause limitations, a pattern of whimsical allocations and exemptions characterizes the application of the City tax in issue. To cite only some examples of these variations:

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[11] *Grunewald* v. *United States*, 353 U. S. 391, 420.

(a) Ostensibly to comply with restrictions under the commerce clause, manufacturers within New York City who sell their products in interstate commerce are taxed by the City on only an allocable portion of their gross receipts, to a maximum of 33⅓%. Appendix B, *infra*, pp. 49-50. It is clear, however, that if the tax here were like the one in *Western Live Stock*—and therefore like that in *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459—the whole of such receipts would be a proper measure of the tax. Recognizing the difference for manufacturers (see p. 16, *supra*), the City denies it for appellant and other publishers similarly situated, effecting a groundless discrimination.

(b) Following the decision in *Matter of McCall Corp.* v. *Joseph*, 284 App. Div. 484, the City grants an allocation and taxes only 30% of the advertising receipts of a magazine similar in all respects to appellant's except that McCall owns the out-of-state plant where its magazine is printed while appellant contracts for out-of-state printing. See *Matter of McCall Corp.* v. *Gerosa*, 2 App. Div. 2d 358. In both cases, the crucial point under the commerce clause should be that major activities take place outside New York (printing, storage of paper, shipping, preparation, etc.), in contrast with *Western Live Stock*. In any event, the single difference of printing plant *ownership*, mistakenly treated by the courts below as vital under the commerce clause, scarcely justifies the enormous difference in treatment of these substantially identical taxpayers.

(c) The City grants an allocation to companies performing industrial services wholly within New York City for customers outside the City, and reaches a maximum of only 66⅔% of such taxpayers' gross receipts. Appendix B, *infra*, pp. 53-54.

(d) Radio and television stations are granted an allocation based upon the number of radio and television families

theoretically reached inside and outside the City, with gross receipts for the latter portion taxed under a formula reaching a maximum of 33⅓%. Appendix B, *infra*, pp. 51-53.[12]

Dismissing appellant's complaint that the foregoing discriminations are arbitrary and unlawful, the Court of Appeals observed briefly (Appendix A, *infra*, p. 32) that "the alleged discriminatory treatment results from *the comptroller's determinations* that certain manufacturers, merchants and broadcasters are actually engaged in interstate commerce." (Emphasis added.) Similarly, concentrating on the asserted discrimination between broadcasters and magazine publishers, the court found the "ready answer" to be "that appellant's advertising receipts result from local activity while radio and television broadcasting is interstate" (*id.*, p. 33).

As we have sought to show, this rationalization is a plain failure. As to manufacturers, it seems clear that the commerce clause requires similar, not different, treatment from that given appellant (*supra*, pp. 15-16). The same would appear to be true for industrial service companies and other magazines which happen to own out-of-state printing plants. Finally, the court's distinction between broadcasters and magazine publishers reflects a mechanical view that the *Fisher's Blend* and *Western Live Stock* decisions, regardless of the actual facts of later cases, engrafted forever upon the commerce clause such a distinction, as a matter of law, between different forms of interstate communication. Nowhere have the courts below or the City stated what factual differences justify this distinction in our case.

The fact is that the odd diversity of results in the application of the New York City tax has no rational foundation in factual differences. Despite the purported justifica-

[12] Other instances of allocations not justified by any factual differences between appellant and the taxpayers receiving such allocations are revealed in the City's regulations at pp. 49, 50-51, 55-57, *infra*.

tion of the commerce clause, these discriminations raise substantial questions under the due process and equal protection clauses. Cf. *Concordia Ins. Co.* v. *Illinois*, 292 U. S. 535, 545; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389. At the least, this attempted justification by the New York Court of Appeals points up the need for correcting the State's construction of this Court's decisions under the commerce clause.

For it is clear that these decisions cannot justify the discrimination to which this appellant has been subjected. And the solution, we submit, lies in vindication of appellant's claim that its advertising receipts deriving from interstate activities must be excluded from the measure of the City's tax under the mandate of the commerce clause.

II.

In its discriminatory application, the tax denies appellant due process and the equal protection of the laws.

As we have noted earlier (pp. 22-24, *supra*), the appellees grant a variety of allocations and exemptions to businesses other than appellant's which have property or other contacts beyond City and State lines. The result is that appellant's advertising service (like that of other national magazines) is unique in that it is the only interstate business as to which the City undertakes to tax in full gross receipts which it attributes to a New York office.

This discrimination, as we have indicated, is justified by no factual differences of any relevant kind between appellant's business and those of other taxpayers paying a substantially smaller tax. It flows, moreover, not from anything the New York legislature wrote, but from the asserted judgment of the appellee Comptroller as to the reach of the commerce clause. In the brief language of the lower

court dismissing this problem (Appendix A, *infra*, p. 32), "the alleged discriminatory treatment results from *the comptroller's determinations* that certain manufacturers, merchants and broadcasters are actually engaged in interstate commerce" (emphasis added). Apparently the Court of Appeals was content to let the Comptroller decide this issue without examining the underlying facts. But a judicial appraisal of these facts is essential to a determination of appellant's contentions under the due process and equal protection clauses.

For the Comptroller's "determinations" in no way mitigate the arbitrariness of the discrimination to which appellant is subjected. The issue here "is the validity of an administrative action, and the scope of the power of classification by an administrator under a statute is obviously much less broad than is the power of the [legislature] * * * in the first instance." *Hamilton Nat. Bank v. District of Columbia*, 156 F. 2d 843, 846 (D. C. Cir.), reaffirmed in 176 F. 2d 624, certiorari denied, 338 U. S. 891. We shall urge the invalidity of the classification in this case under the equal protection and due process clauses as an added ground for reversal of the judgment below.

CONCLUSION

It is respectfully submitted that the decision below is erroneous, that the questions presented are substantial, and that the Court should take jurisdiction of this appeal.

Respectfully submitted,

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February, 1958.

APPENDIX A

1. *Opinion of the Court of Appeals*

In the Matter of NEW YORKER MAGAZINE, INC.,

Appellant,

—against—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, *et al.*,

Respondents.

DESMOND, *J.* This is a proceeding under Article 78 of the Civil Practice Act. The Appellate Division, First Department, unanimously confirmed determinations of the Comptroller of the City of New York which denied petitioner's claim for refund, and assessed additional New York City "Gross Receipts Taxes" (Administrative Code of City of New York, ch. 41, Tit. RR; ch. 46, Tit. B), for the years 1947, 1948 and 1949. Petitioner appeals as of right on alleged constitutional grounds. These taxes were imposed on petitioner's advertising receipts, on the theory that they were the fruits of an activity local to New York City.

Appellant publishes *The New Yorker*, a weekly magazine, in two separate editions. One is referred to as the "city" or "metropolitan" edition and is circulated in New York City and vicinity, while the other is called the "national", "out-of-town" or "star" edition and circulates in upper New York State, throughout the United States and abroad. The city edition charges for advertising at rates lower than those charged for advertisement for the broader coverage. Both editions are identical except as to adver-

tising matter. The city edition contains all of the advertisements contained in the national edition plus local additions. The circulation of *The New Yorker* in New York City is approximately 20% of its total circulation. The magazine is managed, edited and compiled in New York City, but is printed in Greenwich, Connecticut, under a contract with an independent printer there. Appellant owns no printing equipment. It stores at the printer's premises in Connecticut a supply of the paper on which the magazine is printed. The completed magazine is mailed or shipped from Connecticut on directions from appellant's New York circulation department which prepares the mailing wrappers in New York. Dummies of the magazine are made up in the New York office and sent to the printer. Every Monday, when the magazine goes to press, employees of appellant's editorial department go to Connecticut for proofreading and last minute revision of the editorial matter. Last minute changes in advertising are handled by telephone from New York. A substantial part of appellant's advertising comes from outside the State. Appellant has an advertising branch office in Chicago and advertising representatives elsewhere. Prepared cuts, mats and copy are sent to appellant by the advertisers or their advertising agencies. Advertising contracts are kept in the New York office and approval of advertising copy is given there. Bills for advertising are sent from the New York office and payment is received at the New York office, except for advertising solicited by the Chicago office. Some of the editorial matter is prepared outside the State of New York by writers, authors and artists. The tax here involved was imposed on appellant's total receipts from advertising less advertising receipts received from its Chicago branch office.

Appellant asserts that the tax is violative of the commerce clause of the Federal Constitution. To make the

point, appellant attempts to distinguish this case from *Western Live Stock* v. *Bureau of Revenue* (303 U. S. 250). There the Supreme Court held valid a New Mexico "privilege tax" on gross receipts from the sale of advertising. The periodical, prepared, edited and published within the State of New Mexico, sold advertising space to out-of-State advertisers and was circulated to subscribers within and without the State. Appellant, in its attempt to distinguish this case from *Western Live Stock*, lists the following fact differences between the cases, none of which offer a sound basis for such distinguishing. First, *Western Live Stock* arose on demurrer and here there was a trial; second, the difference in the amount of the two taxes; third, no allegation or proof in *Western Live Stock* that the magazine was in competition with and performed the same function as other advertising media (radio and television) taxed on a more favorable basis (allocation by reason of interstate activity); fourth, in *Western Live Stock* no tax on circulation and no concession that the *Western Live Stock* circulation was in interstate commerce while here the tax on circulation receipts was on that part only derived from circulation in New York City, i.e., 20%; fifth, *Western Live Stock's* circulation was by subscription only while a substantial part of *The New Yorker's* interstate circulation consists of newsstand sales all over the country; sixth, advertising was "one" of *Western Live Stock's* sources of revenue while here advertising produced 75% of revenues; seventh, the tax in *Western Live Stock* was expressly levied on receipts "for the sale of advertising space" while here neither the State Enabling Act nor the city Local Law *expressly* tax advertising receipts; and, lastly, *Western Live Stock* had one edition while *The New Yorker* has two editions, one circulated entirely outside New York City. Appellant urges, too, these fur-

ther differences between the two cases: there was in *Western Live Stock* no proof as to circulation outside New Mexico and no allegation or proof that it sold to its advertisers the service of delivering messages to readers throughout the country and abroad. However, in *Western Live Stock*, the Supreme Court assumed that appellant's contracts required out-of-State circulation (303 U. S. 250, 254, *supra*). Appellant next points to one more difference between the fact patterns: that *Western Live Stock* was wholly prepared, printed, published and edited in New Mexico, wherein was its only office or place of business. In the present case appellant, as we have seen, had its printing done outside the State but it would seem that was merely a separable part of its total method of doing business. And the tax here is not on the printing of the magazine but on the New York sale of its advertising. The interstate activities found in the *Western Live Stock* situation were these: circulation in other States besides New Mexico, distribution being by mail and otherwise to paid subscribers; advertising from other States obtained through solicitation out-of-State; payment for the advertising made by remittances sent interstate; interstate shipment by advertisers to the publisher of advertising cuts, mats, information and copy.

Appellant gives us other reasons for its contention that the holding in *Western Live Stock* v. *Bureau of Revenue* (303 U. S. 250, *supra*) is not applicable here. However, in the *Western Live Stock* case the Supreme Court held that "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce"; that "So far as the advertising rates reflect a value attributable to the maintenance of a circulation

of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax" (303 U. S. 250, 258-259, *supra*). Justice STONE in that opinion noted as one reason for the court's decision that a tax on the taxpayer's activity could not be levied elsewhere than in New Mexico (303 U. S. 250, 260, *supra*).

The only real distinction between this case and the *Western Live Stock* case is this matter of printing. In the *Western Live Stock* case the printing and publishing was done in the taxing State. Here, the printing was done out-of-State. However, that was activity by an independent printer. The incidental Connecticut duties of appellant's employees in last minute proofreading and revision is of no more moment than, say, the out-of-State solicitation of advertising in the *Western Live Stock* case. Justice STONE had this to say in this connection: "Experience has taught that the opposing demands that the commerce shall bear its share of local taxation, and that it shall not, on the other hand, be subjected to multiple tax burdens merely because it is interstate commerce, are not capable of reconciliation by resort to the syllogism. Practical rather than logical distinctions must be sought." (303 U. S. 250, 259, *supra*.)

In *Matter of McCall Corp. v. Joseph* (284 App. Div. 484) the Appellate Division, First Department, held that there must be an allocation of receipts based on activities in New York City where New York City gross receipts taxes were levied on advertising revenue of *McCall's* magazine which was printed in Ohio. However, in that case McCall printed the magazine at *its own* printing plant out-of-

State. The same Appellate Division decided this case and its opinion in this case mentions this distinction.

Appellant insists that the New York State Enabling Act (General City Law, §24-a) and the New York City Local Law allow a tax on local business only whereas appellant is engaged in a world-wide business and has been taxed on that nonlocal business. The comptroller, says appellant, exceeded his delegated authority by singling out for discriminatory treatment taxpayers situated like appellant while making allocations for tax purposes of receipts of certain manufacturers, merchants and radio and television broadcasters, and that the comptroller exceeded his authority in changing his regulations without a change in the law or the governing facts. But the alleged discriminatory treatment results from the comptroller's determinations that certain manufacturers, merchants and broadcasters are actually engaged in interstate commerce. As to the charge that the comptroller exceeded his authority in changing his regulations: originally the regulations allowed appellant to allocate its advertising receipts from advertising in the same way it now allocates its receipts from circulation. After the Supreme Court's decision in *Western Live Stock* v. *Bureau of Revenue* (303 U. S. 250, *supra*) the comptroller changed his regulations to provide for tax without allocation on gross advertising receipts, and after the decision in *Matter of McCall Corp.* v. *Joseph* (284 App. Div. 484, *supra*) he again changed his regulations to meet the situation decided in that case. Since the comptroller has power to make regulations, he has power to make them in conformity with the law as decided in the courts.

As to the assertion that the tax is violative of the due process and equal protection clauses of the Federal and State Constitutions, this really is a charge of illegal dele-

gation of legislative power to the comptroller. Appellant under this point urges that the tax as applied to the appellant seems to be based on some supposed grant by the State's Enabling Act to the comptroller of authority to impose the maximum tax permissible under the Constitution, as the comptroller interprets the decisions of the Supreme Court. Appellant says this permits the comptroller to discriminate illegally between types of businesses and between taxpayers in the same type of business. Appellant's main concern under this point is that some businesses have been held to be engaged in interstate commerce and entitled to allocation of receipts for the purposes of the gross receipts tax. Appellant is particularly concerned that radio and television broadcasters, who compete with appellant for advertising business, have been allowed to allocate advertising receipts for taxation purposes on the ground that their advertising activities were in interstate commerce. Appellant's arguments as to equal protection and due process are based on the same proposition. The ready answer is that appellant's advertising receipts result from local activity while radio and television broadcasting is interstate.

The order appealed from should be affirmed, with costs.

Conway, *Ch. J.*, Dye, Fuld, Froessel and Van Voorhis, *JJ.*, concur; Burke, *J.*, taking no part.

Order affirmed.

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2. *Opinion of the Appellate Division*

Breitel, *J.*:

Petitioner, a taxpayer, brings this proceeding, under Article 78 of the Civil Practice Act, to review a determination of the Comptroller of the City of New York which

denied claims for refund and assessed additional city gross receipts taxes for 1947, 1948 and 1949 (General City Law §24a; Local Law No. 14 of 1946; Local Law No. 44 of 1948; Administrative Code, ch. 41, Tit. RR; ch. 46, Tit. B).

The taxpayer is the publisher of a national magazine. The magazine is published and edited out of taxpayer's principal office in New York City, although it is printed, under independent contract, in Connecticut. Its circulation extends, in substantial measure, beyond the borders of the city and its advertising is predominantly national in character. The city has imposed its tax, which is for the privilege of doing business locally, to cover the bulk of the advertising receipts of the taxpayer. The only part excepted is that which is solicited through the Chicago office of the taxpayer, the receipts from which solicitation are also collected through that office. Significantly, receipts from circulation are allocated on an intra-city and out-of-city basis. The taxpayer urges that it is entitled to have its advertising receipts similarly allocated. The city responds that the activity of publishing a magazine is a completely localized one and that advertising receipts, even though from national advertising, are local receipts.

The determination of the Comptroller should be confirmed.

This court quite recently passed upon the problems of local privilege taxation involved in the publication of a national magazine (*Matter of McCall Corp.* v. *Joseph*, 284 App. Div. 484). It was there held that the publication of a magazine was a localized activity and that advertising receipts, even if from national advertising, were subject to local privilege taxation. Distinction was made, however, on the basis that the taxpayer in the *McCall* case did its printing in its own plant in the state of Ohio.

As a consequence, it was determined that the unitary operation of publishing, editing, and printing a magazine, in that case, extended into Ohio. As a consequence, the city was required to make a new allocation in which proper recognition would be given to the several factors of property, wages and receipts, and their geographical basis.

In so holding, this court relied upon *Western Live Stock* v. *Bureau* (303 U. S. 250), in which it had been held that the publication, editing, and printing of a magazine is a localized activity subject to local privilege taxation.

It is now urged by the taxpayer in this case that no recognition has been given by the city, and in effect in the *McCall* case, to the interstate character of advertising which appears in a national magazine. The bulk of the advertisers are located outside the state. They transmit to the taxpayer material for inclusion in advertisements. The advertising is solicited, for the most part, outside the state. It is also argued that the rule in the *Western Live Stock* case no longer has the vitality that it once had; that now, under later decisions of the United States Supreme Court, the protection of the commerce clause has been extended to intangibles and contracts that flow in interstate commerce. In this connection the taxpayer urges the overturn of the rule of *Paul* v. *Virginia* (8 Wall 168), and similar cases, by the later case of *U. S.* v. *South Eastern Underwriters Assn.* (322 U. S. 533), and still later cases that followed in its train, like *Lorain Journal* v. *United States* (342 U. S. 143), in which last case explicit reference was made to the fact that national advertising moved in interstate commerce and, therefore, was subject to the federal anti-trust laws.

Taxpayer, if this analysis be sound, does not meet the issue involved in local privilege taxation. There is no

question that national advertising activities involve a movement in interstate commerce. But the same condition exists with regard to any concededly local enterprise, such as manufacturing, in which the products are eventually sold and delivered in interstate commerce. The fact that the product, or a service, of an enterprise, otherwise local, eventually moves in interstate commerce does not prevent local privilege taxation. Similarly, the fact that there are earlier incidents in interstate commerce, such as preparatory promotion and selling, do not detract from the inherently localized character of the enterprise in producing goods or services.

This is now old and unquestioned law (e.g. *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389; *McLeod* v. *Dilworth Co.*, 322 U. S. 327; *Hans Rees' Sons* v. *No. Carolina*, 283 U. S. 123; *Matter of United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, affd. 307 N. Y. 780, cert. den. 348 U. S. 916, cf. *United Air Lines* v. *Joseph*, 282 App. Div. 48, affd. 307 N. Y. 762).* Indeed, the *United Piece Dye Works* case involves the converse fact situation of that here, but the principle applied is identical. In the *Dye Works* case petitioner conducted an extensive textile processing establishment in New Jersey. Its office in New York was devoted to the solicitation and promotion of business in New York

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* Thus, also, in *Western Live Stock* v. *Bureau* (303 U. S. 250, 253, *supra*), the court said: "Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business."

None claims this is a matter of tight logical distinctions, or that the distinction is derived from the very nature of things. So in the *Western Live Stock* case, Mr. Justice (later Chief Justice) Stone said: "Practical rather than logical distinctions must be sought" (p. 259).

City, for textile processing in New Jersey, and, indeed, there was a rather intensive servicing in that promotional activity. It was held that this activity was in interstate commerce, was not localized, and, therefore, was not subject to local privilege taxation by New York City. By the same reasoning, however, it was perfectly clear that Dye Works' activity in New Jersey would be completely subject to local privilege taxation in that state, even though its promotional activities and its services moved in interstate commerce.

The sale of advertising, and the receipts from such sales by the taxpayer in this case, are no different, for the purposes of local privilege taxation, than the solicitation, sale and delivery, in interstate commerce, of a manufacturer's products otherwise arising from exclusively local activity. On this analysis the holding of the *Western Live Stock* case is still sound law, and in accord with basic cases on this question in the United States Supreme Court (*Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, *supra*; *McLeod* v. *Dilworth Co.*, 322 U. S. 327, *supra*; *Hans Rees' Sons* v. *No. Carolina*, 283 U. S. 123, *supra*). The *South Eastern Underwriters* case (322 U. S. 533, *supra*) and the *Lorain* case (342 U. S. 143, *supra*) marked no change from the traditional view that a localized activity is subject to local privilege taxation despite the fact that its products or services move in interstate commerce. These cases hold no more than that under the power conferred by the commerce clause the federal government may legislate with respect to keeping channels of interstate commerce free and unobstructed. From this it does not follow that a localized activity ceases to be localized, because its products and services eventually move in interstate commerce, or

because, again, there are earlier incidents in interstate commerce, such as promotion and solicitation.*

The matter of multiple taxation which was regarded as so grave a danger in the *Western Live Stock* case (303 U. S. 250, *supra*) may arise when we have local privilege taxation imposed upon a localized enterprise which moves its products or services in interstate commerce. Thus, that danger was present in the *United Piece Dye Works* case (282 App. Div. 60, affd. 307 N. Y. 780, *supra*), but only if it had been found that Dye Works' activities in New York City had become sufficiently localized to be subject to local privilege taxation. It was unqualifiedly present in the *McCall* case (284 App. Div. 484, *supra*). In the *McCall* case the danger arose because the taxpayer, in its unitary operation and ownership, had a localized activity in the State of Ohio as well as in New York. In this case the fact that taxpayer's printing is done in the State of Connecticut does not create that danger, because the printing is done under independent contract, and there is no localized ownership (and therefore activity) of an integral part of the unitary operation of publishing, editing and printing a magazine. The localized activity there, then, becomes that of the printer, rather than of this taxpayer. To the point urged by the taxpayer here, that it warehouses large quantities of paper in Connecticut in order to serve its printer and may, therefore, be subject to local taxation in Connecticut, it must be assumed that any such local taxation, to be valid, could not be a privilege-of-doing-

* Indeed, one must caveat the application of cases to the problem of local privilege taxation, which arise from questions involving the federal power to regulate interstate commerce, jurisdiction for purposes of serving process, power of a state to impose property or other non-privilege taxes on property, products, or services moving in interstate commerce, or any other area not specifically concerned with local privilege taxation.

business tax, although it might be a property tax, or tax based on use, or other non-privilege local tax.

So, in summary, as was stated in the *United Piece Dye Works* case (282 App. Div. 60, *supra*):

> "It has been held many times and the city so concedes that, where one is in one state, the mere selling of merchandise or services in another state does not subject one to tax jurisdiction in the other state" (at p. 62).

Analogously, the selling of advertising in another state and the receiving of income therefrom does not subject one to tax jurisdiction in the other state. If that be true, then the activity of publishing a magazine remains localized in the state or the city where the enterprise is located physically, and, by similar logical extension, there is no danger of multiple taxation. Hence, this court said, in the *McCall* case (284 App. Div. 484, 488, *supra*), with unmistakable clarity, with reference to a magazine:

> "The only activities that occurred outside the State which were not local activities were solicitation, circulation and the interchange of advertising materials. These, under the circumstances, were incidents of the sale of advertising which did not destroy its essential intrastate character."

True, the court was analyzing the *Western Live Stock* case, but it was expressing a general principle and following it.

A minor point is involved in this case. It is conceded by the city that it imposed excessive interest penalties in the amount of $186.13. But since the parties have stipulated that, regardless of the outcome of this appeal, the excess payment will be refunded, no modification of the determination of the Comptroller is required.

With regard to the imposition of penalties and interest, except as otherwise stipulated by the parties, it is found that the Comptroller acted properly within his power and discretion.

The determination should be confirmed.

ALL CONCUR.

3. *Judgment of the Court of Appeals*

BE IT REMEMBERED, That on the 25th day of February in the year of our Lord one thousand nine hundred and fifty-seven, The New Yorker Magazine, Inc., the appellant in this cause, came here unto the Court of Appeals, by Proskauer Rose Goetz & Mendelsohn, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Lawrence E. Gerosa, as Comptroller of The City of New York, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Wilbur H. Friedman, of counsel for the appellant, and by Mr. Morris L. Heath, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the

said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 3, 1957.

---

4. *Denial of Motion for Reargument*

At a Court of Appeals for the State of New York held at Court of Appeals Hall in the City of Albany on the seventeenth day of October A.D. 1957.

* * * * *

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

[SEAL] A copy

Gearon Kimball (signed)
Deputy Clerk

APPENDIX B

Statutes and Regulations

1. Section 24-a of the General City Law of New York provides in pertinent part as follows:

> Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales within such city, measured by the gross receipts from such activities carried on or sales made within the city * * *. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

Section 1. Definitions. When used in this local law the following terms shall mean or include: * * *

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city * * *.

2. Imposition of tax. a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity * * * or of making sales to persons within such city, * * * every person shall pay an excise tax * * * upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business

or commercial activity exercised or carried on by him during each calendar year * * *.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this local law, by reason of the provisions of the constitution of the United States or any other provision of law, the chief fiscal officer shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The chief fiscal officer may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this subdivision b.

* * * * *

2. New York City Local Law 14 of 1946 and Local Law 44 of 1948, under which the taxes involved were imposed, follow the terms of the foregoing enabling act.

3. Regulations issued by the City Comptroller under the above Local Laws, and in effect during the years here involved, provide in pertinent part as follows:

Art. 209. Interstate commerce.

Receipts from transactions involving interstate commerce are not exempt from tax but are to be included

in its measure either in their entirety or upon an allocated basis as provided in subsequent articles of these regulations.

Transactions will be deemed to involve interstate commerce only when they directly involve the sale, exchange or transportation of commodities between the states; the transportation of passengers between the states; or the transmission of intelligence or communications between the states. * * *

* * * * *

Art. 211. Allocation formulae for apportioning receipts from sales in interstate commerce.

I. Regular Allocation Formula

A taxpayer who has receipts from sales in interstate commerce is required to make an allocation and apportionment of such receipts on the basis prescribed by subdivision I of this article. The formula herein set forth is based upon three factors which are calculated to effect a fair and proper apportionment of receipts from sales in interstate commerce to the end that only that part of such receipts which is properly attributable and allocable to the doing of business within the City of New York is included in the measure of the tax. The formula as herein arranged is intended to apply to receipts from transactions involving the sale of tangible personal property in interstate commerce and not to receipts from other types of interstate transactions. A New York City manufacturer, however, who makes sales in interstate commerce may allocate the receipts therefrom on the basis of the alternative formula described in subdivision II of this article.

INFORMATION REQUIRED

(1) *The Property Factor.*—The taxpayer is required to set forth (a) the total average value of all real and tangible personal property employed in business within the City of New York, and (b) the total average value of all such property employed in business within and without the City of New York but within the United States. A percentage is then to be computed on the basis of a fraction using the elements under (a) as the numerator and those under (b) as the denominator.

* * * * * *

(2) *The Wages and Salaries Factor.*—The taxpayer is required to set forth the total amount of wages, salaries and other personal service compensation paid during the basic period (a) to officers and employees who work in, or from, or are attached to, places of business located within the City of New York, and (b) to all officers and employees engaged within and without the City of New York but within the United States. A percentage is then to be computed on the basis of a fraction using the elements under (a) as the numerator and those under (b) as the denominator.

* * * * *

(3) *The Receipts Factor.*—The taxpayer is required to segregate the gross receipts from sales made during the basic period and place them into the following categories:

(a) Receipts from sales in foreign commerce.

(b) Non-allocable and non-taxable receipts.

(c) Wholly taxable receipts.

(d) Allocable receipts, i.e., receipts from sales in interstate commerce subject to allocation.

* * * * *

After the above segregation is made, receipts from sales in foreign commerce and non-allocable and non-taxable receipts are to be deducted from gross receipts preparatory to calculating the percentage required for the receipts factor. A percentage is then to be computed on the basis of a fraction using as the numerator the sum of wholly taxable receipts plus 1/3 of allocable receipts and as the denominator the sum of wholly taxable receipts plus the entire allocable receipts.

Computation of Allocated Receipts to Be Included in Measure of Tax

The percentages which are determined for the three factors hereinabove described are to be added together and the total thereof divided by three to obtain the average of the three percentages. * * *

Where the resultant average of the percentages exceeds 66⅔%, it shall be reduced to 66⅔% for the purpose of allocation. * * *

The amount of allocated receipts to be included in the measure of the tax is determined by applying the resultant average of the percentages or the maximum of 66⅔% * * * to the entire allocable receipts, i.e., receipts from sales in interstate commerce subject to allocation. The amount of receipts so allocated to the City of New York plus the amount of wholly taxable receipts are to be included in the measure of the tax.

* * * * *

Illustrations of Allocable Receipts

(a) Receipts from sales made by a New York City vendor to purchasers located outside the State of New York are to be considered allocable receipts where the goods are shipped from the vendor's factory or warehouse situated within the City directly to the purchaser at a point outside the State of New York.

(b) Receipts from sales made to purchasers located within the City of New York by an out-of-city business house maintaining an office, agency or representative within the City are to be considered allocable receipts where the goods are shipped from the vendor's factory or warehouse situated outside the State of New York directly to the purchaser at a point within the City.

Non-Allocable and Non-Taxable Receipts

Non-allocable and non-taxable receipts are receipts which arise from sales transactions where both the shipping of the goods and the delivery thereof to the purchaser take place entirely outside the territorial limits of the City of New York. Thus, receipts from sales made by a New York City vendor involving the shipment of goods from his own factory or warehouse situated outside the City to the purchaser at a point located outside the City, whether within or without the State of New York, are deemed to be non-allocable and non-taxable receipts.

TRANSACTIONS INVOLVING THIRD PARTIES

a. Where a New York City vendor causes direct delivery to be made to his customer from a third party's out-of-city source of supply, the receipts therefrom fall within the category of:

(1) Wholly taxable receipts if delivery is made to the purchaser at a point within the City of New York.

(2) Non-allocable and non-taxable receipts if delivery is made to the purchaser located at a point outside the City of New York.

It is immaterial whether the out-of-city premises owned or operated by a third party is that of an affiliated or subsidiary company, a contractor engaged by the vendor, or an unrelated entity.

b. Where a New York City vendor enters into a sales contract with a New York City purchaser for delivery of goods to a third party designated by such purchaser, the receipts from such transactions fall within the category of:

* * * * *

(3) Non-allocable and non-taxable receipts, if delivery is made from an out-of-city factory or warehouse owned or operated by the vendor or from his third party's source of supply located outside the City of New York directly to a third party designated by the purchaser located outside the City of New York.

II. ALTERNATIVE ALLOCATION FORMULA APPLICABLE TO NEW YORK CITY MANUFACTURERS

If the taxpayer is a manufacturer engaged in manufacturing, fabricating or producing goods within the City of New

York he may allocate receipts from sales in interstate commerce on the basis of the cost of manufacturing and selling the goods shipped in interstate commerce. A New York City manufacturer who uses this alternative method of allocating receipts from sales in interstate commerce is not required to allocate such receipts on the basis of the formula set forth in subdivision I of this article.

The portion of receipts from sales in interstate commerce to be allocated to the City of New York under this alternative formula shall be an amount equal to 50% of the cost of manufacturing and selling the goods shipped from the City in interstate commerce, subject to the limitation that such cost shall not exceed 66⅔% of the receipts from such sales. The amount of receipts so allocated to the City of New York plus the amount of wholly taxable receipts are to be included in the measure of the tax.

• • • • •

Art. 213. Allocation formula for apportioning receipts from the operation of transportation facilities within and without the City of New York.

Persons subject to the provisions of Article 212 [designating those transportation enterprises subject to the tax] who operate transportation facilities both within and without the City of New York, whether in intrastate or interstate commerce, are required to make an allocation of receipts as hereinafter provided. The allocation formula herein set forth is based upon three factors which are calculated to effect a fair and proper apportionment of receipts from the operation of transportation facilities over routes originating within the City of New York and terminating outside the City and/or originating outside the City of New York and terminating within the City to the end that only

that part of such receipts which is properly attributable and allocable to the doing of business within the City of New York is included in the measure of the tax.

* * * * *

[Here follow detailed provisions for the computation of the three percentage factors—mileage, wages and salaries, and receipts.]

The percentages which are determined for the three factors hereinabove described are to be added together and the total thereof divided by three to obtain the average of the three percentages. * * *

Where the resultant average of the three percentages exceeds 66⅔%, it shall be reduced to 66⅔% for the purpose of allocation. * * *

The amount of allocated receipts to be included in the measure of the tax is determined by applying the resultant average of the percentages * * * to the entire allocable receipts, i.e., receipts from intrastate and interstate traffic over routes originating within the City of New York and terminating outside the City and/or originating outside of the City of New York and terminating within the City. The amount of receipts so allocated to the City of New York plus the amount of wholly taxable receipts are to be included in the measure of the tax.

Art. 214. Radio broadcasting stations; allocation of receipts from radio broadcasting.—

I. General

A person operating radio broadcasting stations within the City of New York is subject to tax under the General Business and Financial Tax Law. Where a person operates

radio broadcasting stations outside the City of New York, whether within or without the State of New York and, in conjunction therewith, maintains offices and/or studios within the City, such person is also subject to the General Business and Financial Tax Law.

To determine the amount of receipts from the sale of sponsored time which is to be allocated to the City of New York, a person subject to tax hereunder is required to make an allocation of receipts as provided in subdivision II hereof. * * *

II. Allocation of Receipts From Radio Broadcasting

A person subject to the provisions of this article is required to apportion to the City of New York as wholly taxable receipts that proportion of the gross receipts from the sale of sponsored time over each station having New York City call letters, without deducting commissions paid to advertising agencies, which the number of radio families within the City bears to the total number of radio families covered by the station.

The balance of gross receipts from the sale of sponsored time is deemed to be allocable receipts subject to allocation on the basis of three factors as hereinafter set forth.

* * * * *

[Here follow provisions for the computation and averaging of the three percentage factors—property, wages and salaries, and radio families. The percentage used for the last factor is the same as the percentage used to determine the amount of wholly taxable receipts.]

Where the resultant average of the percentages exceeds 33⅓%, it shall be reduced to 33⅓% for the purpose of allo-

cation. Otherwise, the actual percentage computed as hereinabove described shall be used to make the allocation provided hereunder.

The amount of allocated receipts to be included in the measure of the tax is determined by applying the resultant average of the percentages or the maximum of 33⅓%, as the case may be, to the amount of allocable receipts from the sale of sponsored time. The amount of receipts so allocated to the City of New York plus the total amount of wholly taxable receipts are to be included in the measure of the tax.

* * * * *

Art. 225. Persons engaged in rendering services within and without the City of New York.—

* * * * *

II. Persons Rendering Industrial Services

Where a person is engaged in rendering industrial services both within and without the City of New York in connection with which such person maintains established places of business both within and without the City, such person is required to make an allocation of receipts from industrial services on the basis of three factors as hereinafter set forth [namely, property, wages and salaries, and receipts] so that only that part of such receipts which is properly attributable and allocable to the doing of business within the City of New York is included in the measure of the tax.

Taxpayers required to make an allocation hereunder include, among others, persons who are engaged in rendering industrial services within the City of New York, such as dyeing, fabricating, manufacturing or otherwise processing articles of trade or commerce belonging to others in connection with which a factory, plant or other establishment is maintained outside the City for the purpose of perform-

ing, in whole or in part, the industrial services for which a charge is made.

* * * * *

(3) *The Receipts Factor.*— * * *

(b) Allocable receipts * * * include * * * receipts from industrial services performed * * * wholly within the City, and rendered to customers located outside the City.

* * * * *

The percentages which are determined for the three factors hereinabove described [property, wages and salaries, and receipts] are to be added together and the total thereof divided by three to obtain the average of the three percentages. * * *

Where the resultant average of the percentages exceeds 66⅔%, it shall be reduced to 66⅔% for the purpose of allocation. * * *

The amount of allocated receipts to be included in the measure of the tax is determined by applying the resultant average of the percentages or the maximum of 66⅔% * * * to the entire allocable receipts. The amount of receipts so allocated to the City of New York plus the amount of wholly taxable receipts are to be included in the measure of the tax.

* * * * *

Art. 230. Publishers.—

Publishers of newspapers, magazines, periodicals, books, etc., doing business within the City of New York are required to report the gross receipts from the sale of such publications. Where the publication is distributed or circulated in interstate commerce, the taxpayer may make an allocation of such receipts in accordance with the provisions of Article 211. Receipts from the sale of advertising space are to be reported in the manner set forth in Article 231.

Art. 231. Receipts from the sale of advertising space.—

The business of providing and selling advertising space in a newspaper, magazine or periodical and the preparation, printing and publication of the advertising matter therein is not deemed to constitute interstate commerce even though the publication is circulated outside the State of New York or the publication is printed at a plant located outside the State. Where the main office of the publisher is situated within the City of New York, the entire receipts from the sale of advertising space are to be included in the measure of the tax.

However, where bona fide branch offices are maintained outside the City of New York, whether within or without the State of New York, for the solicitation and procurement of advertising contracts, a deduction from such gross receipts may be made for advertising contracts solicited or procured by officers and employees who work in, or from, or are attached to, such bona fide branch offices.

Where a publisher's main office is located outside the City of New York and a bona fide branch office is maintained within the City, the receipts from advertising contracts solicited by officers or employees who work in, or from, or are attached to, the New York City office are to be included in the measure of the tax.

In reporting receipts from the sale of advertising space, no deduction may be taken therefrom for agency commissions.

* * * * *

Art. 246. Florists and nurserymen.—

* * * * *

Where a New York City florist takes an order from a customer pursuant to which the New York City

florist gives telegraphic instructions to another florist located outside the City of New York for delivery of flowers or other floral merchandise to an out-of-city point designated by such customer, the New York City florist is required to report the total charge made to the customer as:

(a) Wholly taxable receipts, if delivery is made at a point within the State of New York; or

(b) Allocable receipts, if delivery is made at a point outside the State of New York.

* * * * *

Art. 249. Receipts from the rental of or license to use tangible personal property; allocation of such receipts.—

Persons doing business within the City of New York who own and hold title to tangible personal property which is leased to others are required to report the gross receipts from the rental of or license to use such property according to the rule set forth as follows:

1. Where the original situs of the property is within the City of New York, the receipts from tangible personal property leased to others are deemed to be:

* * * * *

(b) Allocable receipts, if the property is delivered to lessees outside the State of New York but within the United States; and

(c) Non-allocable and non-taxable receipts, if the property is delivered to lessees outside the United States, including the territories and possessions of the United States.

2. Where the original situs of the property is outside the City of New York, the receipts from tangible personal property leased to others are deemed to be:

(a) Allocable receipts, if the property is delivered to lessees within the City of New York;

(b) Non-allocable and non-taxable receipts, if the property is delivered to lessees outside the City of New York, whether within or without the United States.

* * * * *

Art. 250. Receipts from royalties; allocation of such receipts.—

* * * * *

Where a person having receipts from royalties maintains places of business both within and without the City of New York, he shall allocate to the City that proportion of the total amount received as royalties which the cost of doing business within the City of New York bears to the total cost of doing business throughout the world, subject, however, to the following limitations:

(1) If the principal office of such taxpayer is situated within the City of New York and the cost of doing business within the City exceeds 66⅔% of the total cost of doing business, then a maximum percentage of 66⅔% shall be used to apportion such receipts to the City.

* * * * *

(3) If the principal office of such taxpayer is situated outside the City of New York, the actual percentage represented by the ratio which the cost of doing business within the City of New York bears to the total cost of doing business shall be used to apportion such receipts to the City, unless such percentage exceeds 66⅔% and, in such event, it shall be reduced to 66⅔%.

* * * * *

APPENDIX C

Tables Showing Proportions of Out-of-State Circulation and Advertising Receipts

TABLE I*

CIRCULATION

	1947	*1948*	*1949*
Total circulation	318,122	329,573	334,587
City Edition:			
New York City	66,084	67,928	68,486
N. Y. State suburbs	11,176	12,430	11,878
N. J. & Conn. suburbs	20,293	17,928	19,508
Total	97,553	98,286	99,872
National Edition:			
Upper N. Y. State	10,330	9,926	10,938
Other U. S.	190,546	200,757	196,054
Foreign**	19,693	20,604	27,723
Total	220,569	231,287	234,715
Totals			
Outside N. Y. City	252,038	261,645	266,101
in percent	79.2%	79.4%	79.5%
Outside N. Y. State	230,532	239,289	243,285
in percent	72.5%	72.6%	72.7%

* Figures herein are from Exs. 14-18, 19 id., 29, and 30, and from pp. 80-82, 86-88, 235-238 of the printed Record on Appeal.

** Approximately 40% of the circulation considered foreign is circulation to members of the armed forces at undisclosed locations.

TABLE II*

Advertising Receipts

Entire Edition	*1947*	*1948*	*1949*
1) Actual receipts attributed to out-of-town offices**	$ 751,551	$ 734,800	$ 657,241
2) Plus commissions & cash discounts†	151,424	147,589	132,770
3) Total for out-of-town offices (lines 1 + 2)	$ 902,975	$ 882,389	$ 790,011
4) Actual receipts attributed to New York office**	3,543,850	3,675,273	3,729,078
5) Plus commissions & cash discounts†	709,718	738,196	725,988
6) Total receipts attributed to New York office and taxed, Entire Edition (lines 4 + 5)	$4,253,567	$4,413,470	$4,455,066
7) Total Entire Edition actual receipts (lines 1 + 4)	$4,295,401	$4,410,073	$4,386,319
City Edition			
8) Actual City Edition receipts	342,997	408,172	415,325
9) Plus commissions & cash discounts†	68,764	81,830	83 265
10) Total receipts attributed to New York office and taxed, City Edition (lines 8 + 9)	$ 411,761	$ 490,003	$ 498,590

* Figures are from Ex. 36 and from pp. 66-67, 73-74, 250-252 of the printed Record on Appeal.

** After rebates, short rates, etc.

† Commissions and cash discounts were never received, and the commissions appeared nowhere in appellant's books.

Totals Both Editions	*1947*	*1948*	*1949*
11) Total actual receipts attributed to New York office (lines 4 + 8)	$3,886,847	$4,083,445	$4,144,403
12) Total actual receipts all offices (lines 7 + 8)	$4,638,398	$4,818,245	$4,801,644
13) Total taxed receipts (lines 6 + 10)	$4,665,328	$4,903,472	$4,953,656
Percentage of line 13 attributable to circulation:			
(a) In City	(20.77%) $ 968,989	(20.61%) $1,010,606	(20.47%) $1,014,013
(b) Other N. Y. State	(6.76%) 315,376	(6.78%) 332,455	(6.82%) 337,839
(c) Outside State	(72.47%) $3,380,963	(72.61%) $3,560,411	(72.71%) $3,601,803

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

THE NEW YORKER MAGAZINE, INC.,

Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

REPLY TO APPELLEES' MOTION TO DISMISS

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MARVIN E. FRANKEL
Of Counsel

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Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

REPLY TO APPELLEES' MOTION TO DISMISS

The Motion to Dismiss, while it contains a few inaccuracies to which this reply is addressed, leaves unimpaired the demonstration that this case poses substantial issues calling for review by this Court. Like the courts below, the appellees rely mechanically upon *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, neither disputing nor coping with the extensive record of facts showing how widely the interstate preparation, printing, publication and circulation of this appellant's national magazine (like those of the *amici*) differ from the essentially local publication in that case. Similarly, avoiding the problem in a one-sentence invocation of *Western Live Stock* (Motion, p. 17), the appellees do not even attempt to answer our showing (Statement as to Jurisdiction, pp. 9, 14, 18) that

the appellant's delivery of its advertisers' messages across state and national boundaries is constitutionally indistinguishable from the transmission of such messages by radio for which gross receipts were held non-taxable in *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650.

While the basis for this Court's exercise of its jurisdiction seems clear, the Motion to Dismiss tends to obscure or misstate the issues in a few respects. We submit this brief reply to eliminate any possibility of misunderstanding the undisputed facts, the issues, and the relevant precedents involved in this appeal.

1. Distinguishing *Western Live Stock*, we have reviewed the extensive and uncontested facts revealing that substantial amounts of out-of-state property and activities, and extensive travel and communication interstate, are essential to appellant's interstate and international delivery of its advertisers' messages (Statement as to Jurisdiction, pp. 4-8, 11-13, 20-21). Without questioning, but overlooking, many of these facts, the appellees focus upon appellant's admitted activities in New York and assert (Motion, p. 12) that the magazine is "published" in New York.

The important point, of course, is that appellant's substantial and undenied out-of-state and interstate property and activities make it impossible to view "the preparation, printing and publication of the advertising matter" in this case as being the kind of local, intrastate operation the Court ruled upon in *Western Live Stock* (see 303 U. S. at 260). Where the New Yorker is "published" is a question with a variety of possible answers. In the dictionary sense of "print", "issue from the press" or "put into general circulation" Webster's *New International Dictionary*, 2d ed., 1949)—undoubtedly the sense used in *Western Live Stock*—the magazine is "published" in Connecticut, where it is printed and whence the copies are mailed or shipped.

The crucial distinctions from *Western Live Stock* here are (a) that an identifiable portion of appellant's advertising receipts—that attributable to the excess of the entire edition over the city edition rate—would never be contracted for by the advertisers but for the demonstrated extent and quality of appellant's interstate and foreign circulation, and (b) that the interstate portion of appellant's advertising receipts which we claim New York City cannot constitutionally tax is earned solely by the circulation to readers in other states and abroad of advertising in magazines printed in Connecticut, and mailed from the Greenwich, Connecticut, post office or shipped from Connecticut by railway express or truck.* This complex of commerce facts—interstate printing, preparation, and delivery—renders *Western Live Stock* inapposite and brings this case within the protection laid down in cases like *Fisher's Blend* and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434.

2. As to the latter case, *Gwin, White & Prince*, the appellees treat it (Motion, p. 16) as involving "selling produce in other states and foreign countries," and urge on this ground that it affects only appellant's circulation receipts, not the advertising receipts here involved. It bears mention, therefore, that *Gwin*, precisely like this case, involved the interstate rendition of a service. The taxpayer there was a "marketing agent" arranging for the sale of the products of fruit growers, not selling its own. 305 U. S. at 435-436. It was for this "service" that the taxpayer was paid (*id.* at 437); it was these payments which this Court held non-taxable because the tax "reach[ed] the

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* As noted by the court below (Statement as to Jurisdiction, p. 28), the "completed magazine is mailed or shipped from Connecticut"—a fact which is only partially described when appellees observe (Motion, p. 13) that "the printer mails some of the copies" from Connecticut.

entire interstate commerce *service* rendered both within and without the state and burden[ed] the commerce in direct proportion to its volume" (*id.* at 438, emphasis added). Our point here is that the rule should be no different with respect to appellant's "interstate commerce service" of printing, publishing and distributing advertisements to a particular class of readers. And see *Fisher's Blend, supra,* 297 U. S. at 656.

3. The appellees urge as an argument for dismissing the appeal (Motion, pp. 13, 16) that there is no problem of a multiple burden here. They argue that other states could not levy a tax like the City's on appellant's advertising receipts and that cases like *Fisher's Blend* and *Gwin, White & Prince* are distinguishable on this ground. The argument misconceives both the unquestioned facts of this case and the import of this Court's decisions on the subject.

As we have shown (Statement as to Jurisdiction, p. 19), if the City's tax has been validly applied here, the appellant is exposed to the possibility of similar taxation in Connecticut and states where it has sales offices, where its salesmen solicit advertising, and where the magazine is sold at newsstands. Moreover, as *Western Live Stock* itself demonstrates, the pertinent theory of "multiple burdens" is applicable even where the potential tax in other states is a tax of a different kind on a different taxpayer—and even where such additional tax is invalid. Analyzing the forbidden tax on radio advertising receipts in *Fisher's Blend,* this Court pointed out in *Western Live Stock* that the vice of multiple taxation in the former case existed because "[i]f broadcasting could be taxed, so also could reception." 303 U. S. at 260.

It is clear, of course, that the tax on reception would not have fallen on the broadcasting taxpayer in *Fisher's Blend.*

It is significant, too, that the case this Court cited on this radio situation in the passage just quoted from *Western Live Stock* was a decision of a three-judge court declaring *invalid* a tax on the owners of receiving sets. *Station WBT, Inc.* v. *Poulnot*, 46 F. 2d 671 (E. D. S. C.). These points bear reemphasis in the light of appellees' misinterpretation of this Court's pronouncements on the multiple burden problem.

It should be mentioned, furthermore, apart from the ample showing of a potential multiple burden in the circumstances of this case, that such a showing is by no means necessary to the invalidation of a tax which, like the one in this case, directly burdens interstate commerce. *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433 (New York City gross receipts tax held invalid as to taxpayer all of whose property and activities were in New York City); *Freeman* v. *Hewit*, 329 U. S. 249, 256-57.

4. Tacitly acknowledging the fact that appellant's advertising service is the only interstate business which the City taxes in full, while all others receive substantial exemptions for out-of-state activities (Statement as to Jurisdiction, p. 25), appellees suggest (Motion, p. 17) that "appellant appears to concede" that this pattern is required under the Federal Constitution. There is certainly no such concession. Our argument, more fully detailed in the Statement as to Jurisdiction (pp. 15-16, 22-26), is that:

(a) The ruling in *Western Live Stock* followed *American Manufacturing Co.* v. *St. Louis*, 250 U. S. 459. Read together, these cases show that if a tax could reach in full the gross receipts from appellant's advertising service, it should reach at least equally the full receipts of manufacturers shipping their products in interstate commerce. Thus, by granting an allocation to manufacturers, and justifying this

under the commerce clause, the City has demonstrated that its tax differs from the one in *Western Live Stock* just as it differs from the one in *American Manufacturing*. This demonstration requires reversal of the decision below wholly aside from the factual differences which distinguish this case from *Western Live Stock*.

(b) Additionally, we urge that, apart from the commerce point, the variety of exemptions and allocations for all interstate businesses other than appellant's effects a deliberate and systematic discrimination offensive to the due process and equal protection clauses.

In these arguments that the tax violates the Constitution there is surely no suggestion that appellees are "required" by the Constitution to reach the determinations appellant attacks. Indeed, the most immediately apprehended point in this case is that national magazine advertising has been singled out for a unique tax burden which at once transgresses the commerce clause and discriminates arbitrarily in favor of other businesses which are factually and constitutionally indistinguishable.

CONCLUSION

It is respectfully submitted that the motion to dismiss should be denied and that the Court should note probable jurisdiction of the appeal.

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April, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 816

THE NEW YORKER MAGAZINE, INC.,
Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York dated July 3, 1957; motion for reargument denied by order of that Court dated October 17, 1957.

The opinion of the Appellate Division of the New York State Supreme Court, First Judicial Department, is officially reported in 2 AD 2d 600 and the opinion of the Court

of Appeals of the State of New York is officially reported in 3 NY 2d 362. Both opinions are set forth in Appendix A of the appellant's statement as to jurisdiction.

By this appeal, the appellant challenges the constitutional validity of the New York City General Business and Financial Tax, as imposed on it for the privilege of carrying on business within the City, to the extent that the tax is measured by appellant's gross receipts from advertising. It contends that the tax, to the extent that it is measured by such receipts, is repugnant to the Commerce Clause.

It also contends that the City of New York, in taxing its advertising receipts as receipts from a local business while taxing receipts from interstate sales and from radio and television broadcasting as receipts from interstate commerce, deprives it of its property without due process of law and denies it the equal protection of the laws.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes and Regulations Involved

The statutes imposing the tax, and the regulations of the Comptroller of the City of New York issued thereunder, are set forth in Appendix B of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul and correct determinations of the Comptroller of the City of New York denying refund of general business taxes and assessing additional such taxes for the three year period, 1947-1949, inclusive, in the total principal amount of $18,633. The determinations under review were made as the result of a hearing held by the Comp-

troller of the City of New York at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing and both sides introduced testimony at the hearing.

Under the practice in New York the adminstrative hearing constitutes the trial of the issues in the case (Civil Practice Act, Article 78). The determinations issued in this case as a result of the hearing were first reviewed by the Appellate Division, First Department, which unanimously confirmed them. Upon appeal by appellant to the Court of Appeals of the State of New York that court unanimously affirmed.

Both courts wrote opinions, and both held the case to be directly controlled by *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

Facts

I

Appellant is a New York corporation engaged in the business of publishing "The New Yorker," a weekly magazine. It has not qualified to do business in any other state (fols. 145-146, 272, 964-966).

Appellant's operating and executive offices are situated at 25 West 43rd Street, in the Borough of Manhattan, City of New York, and it occupies several floors of the building at that address (fols. 279, 311-313, 445-446). This is its only place of business, except for an advertising sales office in Chicago (fols. 275-277).

Blanchard-Nichols, an independent concern with offices in San Francisco and Los Angeles, California, and Atlanta, Georgia, has a contract with appellant to solicit advertising for appellant and it assigns one man in each of its aforesaid offices to this activity (fols. 276-277, 283-284, 417-418).

II

Appellant owns no printing equipment and does not print the magazine itself (fols. 279-280, 299). The magazine is printed by an independent company, the Condé Nast Press, at its printing plant in Greenwich, Connecticut, under a contract with appellant (fols. 275, 1010-1011; City's Exhs. A and B). There is no corporate connection between the printer and appellant (fols. 273-274).

The magazine is entered as second-class matter with the post office in the City of New York (Appellant's Exhs. 3-6).

Appellant has no office at the printing plant and no employees regularly stationed there (fols. 315, 966-975, 995-998). Under the contract appellant furnishes the paper on which the magazine is printed. This paper is stored by the printer in its general warehouse until needed (fols. 1036, 1059-1063).

III

The main office of appellant's advertising department in its New York City office is responsible for the acceptance of all the advertising carried in the magazine (fols. 410-412, 422-427, 436-437). This involves not only credit approval but approval for taste as well, as "The New Yorker maintains a very high standard of advertising acceptability" (fols. 423-425).

The advertising department keeps a record of all space contracted for by advertisers in future issues of the magazine (fol. 438). Prior to the closing date for a given issue the advertising agency or advertiser sends in cuts and copy of the proposed advertisement (fols. 437-440). Most of them are received by appellant's advertising department in New York City, but on rare occasions, when they come in very late, they go directly to the printer (fols. 439-440, 487-488, 494).

In either case, the printer prepares a proof and sends it to the appellant's advertising department in New York City, which maintains a "dummy," constituting an exact replica of the advertising to be included in the issue itself. If the proof is accepted by the advertising department, it is added to this dummy (fols. 438-442, 477-478).

The advertising dummy is sent by the advertising department to the printer each week, together with a dummy of editorial matter prepared and sent by the editorial department. The printer is required to follow these dummies exactly in printing the magazine (fols. 447-450).

Any last minute changes with respect to advertising matter are authorized by a telephone call to the printer from appellant's advertising department in New York City (fols. 497-500).

A group of five or six employees of the editorial department go to the printing plant for part of one day a week to check, proofread and make final changes in editorial matter (fols. 314-315, 1012-1023). These individuals make no changes in the advertisements (fol. 1034).

IV

The distribution of the magazine is supervised and directed by the circulation department, consisting of a manager and 55 employees, all located in appellant's New York City office (fols. 269-270, 311-312, 729-730). That department maintains the list of subscribers and prepares the mailing wrappers for the magazines (fols. 715-717, 724). The printer ships the magazines as directed by this department (fols. 717-723).

Under the printing contract, Condé Nast is required to deliver the magazines "to Grand Central and General Post Offices N.Y.C." (City's Exh. A, p. 4; City's Exh. B, p. 5). The actual practice appears to vary from the contract

somewhat. Appellant's circulation manager testified that copies of the magazine are mailed to subscribers and newsstands both at the New York Post Office and at the Greenwich, Connecticut Post Office (fols. 719-720).

V

Appellant publishes and sells only one magazine, "The New Yorker." The magazine circulates throughout the country, including the City of New York where it has approximately 20% of its circulation. All copies of the magazine are identical, except that the copies which circulate in the New York City metropolitan area (called the "city" edition) contain a few additional pages of advertising and some additional editorial matter not found in the copies circulated elsewhere (fols. 145-148, 172-174, 471-472, 941-943). The additional editorial matter appears to be confined to a listing, on approximately one page, of the motion pictures being shown in New York City neighborhood motion picture theaters.

The additional advertisements inserted in the copies of the magazine that circulate in the New York City area are those of local stores and other advertisers desiring to reach only this marketing area (fols. 394-395). But, except for these relatively few advertisements, every advertisement in the magazine appears in identical form in every copy of the magazine, including the copies circulated in the City of New York (fol. 901).

For its own convenience, and to fix advertising rates, the copies of The New Yorker magazine that circulate in the New York City metropolitan area are designated by appellant as the city or metropolitan edition; the copies that circulate outside this area are referred to as the star or out-of-town edition (they bear a small star on the front cover); and the total number of copies is known as the entire or complete edition (fols. 146-148, 394-395, 941-943). However, in selling the magazine no such distinctions are

made. All copies are sold as copies of The New Yorker magazine and are identical in price, appearance and format.

Except for the star on the cover, it is impossible to tell one copy from another, short of a careful page by page comparison. Appellant itself, in reporting its circulation to the Audit Bureau of Circulations, characterizes the differences as a "slight difference in editorial content and arrangement, and a small difference in advertising content" (Appellant's Exh. 14, par. 28, p. 391 of the record).

Appellant did not accept advertising solely in the so-called star or out-of-town edition; i.e., the copies of the magazine which were circulated outside the New York City metropolitan area. An advertiser could advertise in the so-called "entire" edition (obtaining national coverage, including New York City) or in the "city" edition (obtaining coverage of the metropolitan New York City area only). It was given no third choice (fols. 1162-1163). Hence, every advertisement accepted by appellant circulated in the City of New York, either as printed in the city edition copy of the magazine, or in both the city and star edition copies.

VI

Appellant's advertising receipts are not taxed in any state or local jurisdiction outside of the State of New York (fols. 960-964). The appellant's assertion that Connecticut is threatening to tax it is not based on anything in the record. The asserted threat of tax is not claimed to involve taxation based on advertising or advertising receipts.

The City of New York excluded the receipts of appellant's Chicago office in taxing its advertising receipts herein. The tax for 1949 was imposed on $4,953,656 of advertising receipts. It amounted to $9,907 (at the rate of ⅓ of 1%), of which $7,552 is disputed by appellant.

The tax for 1948 was approximately the same, and for 1947 was less, since the rate of tax was 1/10 of 1% in that year (Appellant's Exh. 36).

In its statement of the facts the appellant states that the tax was based on more than 100% of the advertising receipts because of the inclusion of advertising agency commissions (statment as to jurisdiction, p. 8). The appellant, however, withdrew "any claim for a refund of tax" assessed with respect to advertising agency commissions and discounts, but, nevertheless, sought to reserve the right to argue arbitrariness (fol. 1107).

The tax on appellant's circulation receipts was apportioned to reach only receipts from the sale of the magazine in New York City, and no issue is raised with regard to the tax on circulation receipts (Appellant's Exhs. 31-33, Record, pp. 417-441; Appellant's Exh. 36).

POINT I

The challenge to the constitutionality of the New York City General Business and Financial Tax as applied to appellant's advertising receipts in this case presents no substantial federal question since the case is indistinguishable from, and is squarely controlled by, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

The issue in this case is not novel or unsettled, and the decision of the Court of Appeals of the State of New York is not in conflict with any decision of this Court. In fact it is expressly and wholly based on the decision of this Court in the case of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

No substantial federal question is presented since the *Western Live Stock* case is indistinguishable from this case on the facts and is still sound law.

A. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) is controlling in the present case.

I

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) this Court held constitutional a New Mexico privilege tax, measured by the amount or volume of business done, as applied to the gross receipts received by a magazine publisher from the sale of advertising space. The issue was stated to be whether such a tax on publishers "who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce" (303 U. S. at p. 252).

The following description of the business of the Western Live Stock concern appears at page 8 of the record of that case in this Court:

> "the contracts negotiated and entered into with such advertisers provide for and contemplate a continuous passage of contracts, correspondence, plates, cuts, mats, engravings, copy, intelligence and information from the advertiser across state lines to plaintiff, the printing of such advertising in its journal, and its circulation and distribution in such journals by means of motor trucks, railroads, express, and the United States mails throughout the states of the United States * * *."

This Court held that the mere formation of the advertising contracts between persons in different states did not bring the advertising within the protection of the Commerce Clause (303 U. S. at p. 253). It then rejected the argument that such protection applied because the publication had an interstate circulation. It held

that the business taxed was "distinct from interstate commerce" and that (p. 258):

> "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce."

II

The New Mexico statute involved in the *Western Live Stock* case imposed "privilege taxes, measured by the amount or volume of business done," at different rates on different businesses. The tax was imposed on the business of publishing newspapers and magazines at the rate of 2% of the gross receipts; "but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space" (303 U. S. at p. 251, footnote 1).

The tax here in issue is imposed "for the privilege of carrying on * * * business" within the City. The rate is 1/5 of 1% and the tax is measured by "all receipts received in and/or allocable to the city" (General City Law of the State of New York, sec. 24-a, subsec. 2a; Administrative Code of the City of New York, sec. B46-2.0, subd. a).

Thus, both are privilege taxes imposed on magazine publishers for the privilege of engaging in the publishing business within the taxing jurisdiction and are measured by gross receipts.

III

In the *Western Live Stock* case the Court said that the "preparing, printing and publishing is peculiarly local and distinct from its circulation" (303 U. S. at p. 258). The appellant argues that in the case at bar both the printing and publishing of the magazine advertising were carried on largely outside New York and that part of the preparation was done in Connecticut.

We shall now show that, to the extent that appellant participated in them, the preparation, printing and publishing of advertising matter were done by it entirely in New York City.

a. *Preparation*

In neither the *Western Live Stock* nor in the present case did the publisher create the advertisements. In both cases the advertiser or the advertising agency prepared the "cuts, mats, engravings (and) copy" and sent them to the magazine (*Western Live Stock record*, p. 8).

All advertising orders are accepted by appellant at the New York office. The advertising is "carefully scrutinized" by appellant which exercises a "very close censorship" and places a quota on liquor advertising (fol. 869). In fact, where the advertising does not meet the appellant's standards, the advertiser is told what he should put in the advertisement and is given the option to "either accept our recommendations or withdraw the advertising" (fols. 871-873). Each year 30 to 40 accounts are rejected for failure to meet appellant's standards or because of its liquor quota (fols. 880-883).

This supervision over advertising exceeded anything shown in the *Western Live Stock* case.

b. *Printing*

While it is true that the actual printing is done by an independent Connecticut printer, every aspect of the printing in which the appellant participates is done at the New York office or under its direction. The makeup department in New York determines where each advertisement will be placed in the magazine and prepares a dummy which is an exact replica of the issue (fols. 438-439). This dummy is a guide for the printer who must follow it in all respects (fols. 445, 448-450). The proof is then sent to the appellant in New York (fols. 442, 478). All last

minute changes relating to advertising are made by telephone from the New York office to the printer (fols. 497-499).

No one from the advertising department goes to Connecticut and that department does not in any way participate in the printing aside from the New York activities just described. The once-a-week trips to the printer by a few members of the editorial department have nothing to do with advertising (fol. 1034). Their last minute revisions and checking of copy are confined to the editorial matter.

The exclusively local activities of this appellant with respect to advertising are no less local because an independent third party does the printing in another state. The mere fact that the appellant does not do the printing itself cannot transform its advertising activity into interstate commerce or bar the imposition of the tax. Certainly, no such argument could be advanced if the third party printer were located in New York. Nor can the chance fact that the independent printer is located in Connecticut alter this. There is no basis for treating the printing in Connecticut, which is done by a third party, as though it were an activity actually performed by the appellant itself in another state.

c. ***Publishing***

The claim that the magazine is "published" in Connecticut is directly contradicted by the legend contained on the index page of The New Yorker magazine itself, which reads as follows (p. 2 of Appellant's Exhs. 3 and 4):

> "The New Yorker, published weekly by the F. R. Publishing Corporation, 25 W. 43rd St., New York 18, N. Y. * * * Entered as second-class matter, February 16, 1925, at the post office at New York, N. Y. * * * Printed in U. S. A. * * *."

The contract with the printer called for shipment to the public from New York ("Roll wrap and deliver to Grand Central and General Post Offices N. Y. C.", City's Exh. A, p. 4; City's Exh. B, p. 5). And all circulation instructions were issued from appellant's office in New York (fols. 729-730).

The New York address is given as appellant's office on the rate cards (record, pp. 385-386), in official announcements (*id.*, pp. 387-388), in statements and reports to the Audit Bureau of Circulations (*id.*, p. 391; Pet's Exhs. 15, 16, 17, 29, 30) and in promotional material (record, pp. 407, 409, 411; Appellant's Exh. 39).

Surely the independent Connecticut printer is not the publisher. It seems equally clear that the place of publication does not shift from New York to Connecticut simply because the printer mails some of the copies of the magazine from the latter state.

IV

Just as in the *Western Live Stock* case, there is no danger of multiple taxation of the advertising receipts in the present case. Any risk of multiple taxation arising from the possibility that a state where the appellant has an office for the solicitation of advertising might tax such receipts has been eliminated. All receipts from the one such office maintained by the appellant have been excluded from the measure of the tax. Nor can the mere fact that the magazine circulates in other states furnish such states with a basis for taxing the advertising receipts (303 U. S. at p. 260).

Similarly, there is no danger of taxation of the advertising receipts by Connecticut. On this point it suffices to quote the well reasoned statement of the intermediate court below (2 AD 2d at p. 604):

"In this case the fact that taxpayer's printing is done in the State of Connecticut does not create that danger, because the printing is done under independent contract, and there is no localized ownership (and therefore activity) of an integral part of the unitary operation of publishing, editing and printing a magazine. The localized activity there, then, becomes that of the printer, rather than of this taxpayer. To the point urged by the taxpayer here, that it warehouses large quantities of paper in Connecticut in order to serve its printer and may, therefore, be subject to local taxation in Connecticut, it must be assumed that any such local taxation, to be valid, could not be a privilege-of-doing-business tax, although it might be a property tax, or tax based on use, or other non-privilege local tax."

V

Appellant's use of so-called "editions" in selling its magazine does not establish a circulation pattern essentially any different from that in the *Western Live Stock* case. In that case all copies of the magazine were the same. Here, the copies of the New Yorker that circulate within New York City are essentially the same as the copies circulating elsewhere. In editorial content there is only a very slight difference. And in advertising content there is no difference whatsoever except that the copies circulating within New York City contain a number of advertisements omitted from the copies circulated elsewhere.

Nor does the appellant's national circulation cause this case to differ from *Western Live Stock*. In that case this Court proceeded on the assumption that the advertising contract stipulated "that the advertisements shall be sent to subscribers out of the state, or is so framed that the

compensation would not be earned if subscribers outside the state should cancel their subscriptions" (303 U. S. at p. 254).

B. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) is still sound law.

During the twenty years since the *Western Live Stock* case was decided this Court has referred to it in thirty different decisions: twenty-five times in majority opinions; three times in dissenting opinions; and twice in dismissing appeals for want of a substantial federal question. In none of these cases has the authority of the decision been overruled or questioned. In every instance it is cited with approval.

Appellant appears to rely principally on the three cases of *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (1951); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939) and *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650 (1936).

The *Lorain Journal* case involved a Sherman Antitrust Act prosecution against a newspaper publisher to enjoin it from monopolizing commerce. In sustaining the Federal Government's jurisdiction this Court relied on cases which specifically state that federal regulation may extend to activities which are, beyond dispute, subject to state taxation.

> *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311 (1923);
> *Stafford* v. *Wallace*, 258 U. S. 495, 525-528 (1922);
> *Swift & Co.* v. *United States*, 196 U. S. 375, 399-400 (1905).

In fact, the Sherman Act may be applied to competitive practices which, for tax and other purposes, are regarded as wholly intrastate.

United States v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120 (1942);
Mandeville Farms v. *Sugar Co.*, 344 U. S. 219, 234 (1948).

Most significant is the fact that the Court in the *Lorain Journal* case decision made no reference to the *Western Live Stock* case, although counsel for the publisher relied upon it in his brief. And the subsequent references by this Court to the *Western Live Stock* case in two 1954 decisions (*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 165-166, 169-170 and *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 597-598) indicate that its authority has not been limited.

Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939), involved a Washington privilege tax, measured by gross receipts, applied to a Washington concern selling produce in other states and in foreign countries. The tax, as measured by the receipts from such sales, was held to be invalid on the ground that it was an unapportioned tax on activities extending beyond the limits of the state.

The case might be relevant if the present tax were imposed on appellant's receipts from the circulation of its magazine in states other than New York. But the appellant's receipts from circulation have been taxed, without challenge, only to the extent of the receipts from circulation of the magazine within the City of New York. The only dispute relates to the tax on appellant's separate and distinct local advertising receipts.

In the *Gwin White* decision the Court expressly distinguished the situation in that case from the *Western Live Stock* case. It said that the states to which the commerce extended were in a position to impose a tax similar to the Washington tax on the activities carried on in those states, thus exposing the business to the risk of multiple taxation, whereas such a risk was absent in the *Western Live Stock* case (305 U. S. at pp. 439-441).

With regard to the *Fisher's Blend Station* case, the obvious answer is that it was considered in the *Western Live Stock* case and distinguished on the ground that broadcasting is "itself interstate communication" (303 U. S. at p. 260).

POINT II

The appellant's due process and equal protection contentions are completely without merit.

The appellant's argument is that it is being discriminated against because other businesses have been taxed on an allocation basis while all of its advertising receipts from its New York office have been taxed. The answer is that the allocations were all required by the federal constitution under rulings by this Court. The appellant appears to concede that this is so, but asserts that there is no "factual" difference" between it and those who pay tax on an allocated basis. Its argument comes down to a repetition of its Commerce Clause contention or a claim that one not protected from state taxation by the Commerce Clause may limit such taxation on the ground that it resembles those protected from taxation by the Commerce Clause.

The appellant argues also that, since the tax law authorizes the Comptroller to decide the circumstances in which allocation of tax is required by the federal constitution, the validity of this administrative action may be judicially reviewed.

Such a delegation of powers to the Comptroller is necessary and valid. *Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942); *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 215 (1936).

So far as the Comptroller's determination affects the appellant it is reviewable and has been reviewed in the present case. On the other hand, the appellant cannot escape tax simply because, in interpreting this Court's

decisions concerning the Commerce Clause, the Comptroller may have made an error in concluding that another class of taxpayers cannot be taxed except on an allocated basis. *Charleston Assn.* v. *Alderson*, 324 U. S. 182, 190-191 (1945); *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1944). Moreover, no such error has been shown.

CONCLUSION

The appeal to this Court from the order of the Court of Appeals of the State of New York should be dismissed.

March 17, 1958.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 816

THE NEW YORKER MAGAZINE, INC.,
Appellant,

—v.—

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Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF FOR THE HEARST CORPORATION AND TIME, INCORPORATED, AS *AMICI CURIAE*

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF FOR THE HEARST CORPORATION AND TIME, INCORPORATED, AS *AMICI CURIAE*

Pursuant to Rule 42, and with the consent of all parties, The Hearst Corporation and Time, Incorporated, respectfully submit this brief as *amici curiae* urging that this Court take jurisdiction of the appeal.

The *amici curiae*, like the appellant, are publishers of national magazines which are largely prepared, printed and circulated outside the City and State of New York, but maintain advertising and editorial offices in New York City among other places. As in appellant's case, the New York City gross receipts tax statutes have been applied to these magazines so as to tax the great bulk of their advertising receipts—namely, all receipts from advertising contracts solicited or procured by agents based at the magazine's New York office—without apportionment for their activities, property and circulation outside of New York City and State.

Like the appellant, the *amici* have unsuccessfully argued to the appellees that the local statutes, as thus applied, transgress the commerce clause. The issue is posed in pending claims for refund by Time, Incorporated, for all years since 1948 and in disputed assessments upon The Hearst Corporation for the years since 1950. An authoritative ruling by this Court on the instant appeal will resolve a problem which is widespread and repetitive in its impact.

Considering only the operations of the two publishers for which this brief is filed, the present case affects magazines with a combined circulation of over 15,000,000. We set forth in Appendices hereto the circulation and other pertinent figures for eleven of these magazines, all of which are printed and partly prepared outside of New York City and State. In all cases, the magazines are shipped directly from out-of-state contract printing plants to subscribers or newsdealers, most of whom are also outside New York City and State. As the figures show, the tax asserted by New York City reaches large amounts of gross receipts attributable solely to interstate activities and in no sense fairly attributable to activities in New York.*

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* Cowles Magazines, Inc., publisher of LOOK, has informed the *amici* that it, too, is directly affected by the problem in this case. Cowles Magazines, Inc., is an Iowa corporation whose entire subscription operation is maintained at its home office in Des Moines. It has nine branch advertising offices outside of New York State but maintains editorial, executive and advertising offices in New York City. Like the magazines of appellant and these *amici*, LOOK is printed outside New York State by an independent contract printer. Approximately 94% of LOOK's circulation for the five-year period 1952-1956 was outside New York City and approximately 88% was outside New York State. The City tax was levied upon an average of approximately 44.5% of the LOOK gross advertising receipts during that period. The Comptroller has set for hearing on March 18, 1958, claims by Cowles Magazine, Inc., for tax refunds covering the years 1953-1955 and deficiency claims by the City covering the years 1952-1954.

The appellant has made and documented the point, which is in any event common knowledge, that the essence of magazine advertising is delivery of the advertiser's message to the readers. The record shows, too, that in their sales of this service magazines compete with such media as radio and television. It seems perfectly clear that today there can be no economic or constitutional justification for New York City's denial to national magazines of the apportionment which is accorded to radio and television broadcasters and other taxpayers engaged in interstate commerce.

For reasons the appellant has outlined—reasons which merit fuller presentation and consideration by this Court on a hearing of this appeal—the decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, cannot fairly be read as adequate authority for the City's discriminatory scheme of taxation. On the contrary, the principles of *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, and *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650, are squarely opposed to the ruling below. Moreover, there is a substantial question whether it is possible in the light of today's economic realities to square the *Western Live Stock* decision with *Fisher's Blend*.

In any event, it bears emphasis that the case in *Western Live Stock* was made only by pleadings, and that the small publication there involved appeared from those pleadings to be in fact essentially local in character. In the present case, a substantial record of testimony and exhibits illustrates the truly and exclusively interstate (and international) nature of advertising in national publications like those of the appellant and the *amici*.

It is incongruous that a decision a generation ago, on a sketchy record of wholly different facts, should be held

decisive today in a case like this one. The appellant correctly asserts that the New York Court of Appeals has erred in its uncritical reliance upon an inapposite precedent. At the least, it is submitted, the problem is one of sufficient difficulty and general importance to warrant full examination by this Court.

Accordingly, these *amici* urge with appellant that this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

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APPENDIX A

Hearst Corporation Publications

Circulation Figures and Percentages of Gross Receipts Taxed by New York City

	1950	*1951*	*1952*	*1953*	*1954*
I. COSMOPOLITAN					
A. Circulation					
(1) Within New York City	116,479	108,575	85,387	85,411	53,700
(2) Within New York State	228,036	212,381	190,319	175,272	118,199
(3) Outside New York State	1,744,595	1,789,865	1,675,550	1,527,905	1,052,093
B. Percentage of Circulation					
(1) Within New York City	5.79%	5.20%	4.70%	4.70%	4.67%
(2) Within New York State	11.56%	10.60%	10.20%	10.30%	10.10%
(3) Outside New York State	88.44%	89.40%	89.80%	89.70%	89.90%
II. GOOD HOUSEKEEPING					
A. Circulation					
(1) Within New York City	122,422	133,629	140,735	144,221	140,224
(2) Within New York State	296,873	304,498	319,429	340,613	345,311
(3) Outside New York State	2,714,010	2,777,462	2,881,261	3,072,342	3,097,473
B. Percentage of Circulation					
(1) Within New York City	4.02%	4.02%	3.90%	3.93%	3.85%
(2) Within New York State	9.86%	9.88%	9.98%	9.98%	10.03%
(3) Outside New York State	90.14%	90.12%	90.02%	90.02%	89.07%
III. MOTOR					
A. Circulation					
(1) Within New York City	2,227	2,256	2,225	2,271	2,234
(2) Within New York State	6,783	7,003	7,126	7,156	7,377
(3) Outside New York State	61,594	65,565	71,703	73,886	75,514
B. Percentage of Circulation					
(1) Within New York City	3.13%	2.92%	2.77%	2.76%	2.66%
(2) Within New York State	9.92%	9.65%	9.04%	8.83%	8.90%
(3) Outside New York State	90.08%	90.35%	90.96%	91.17%	91.10%

IV. Motor Boating

A. Circulation					
(1) Within New York City	5,364	3,517	3,636	3,800	3,320
(2) Within New York State	7,919	7,937	8,244	8,651	9,301
(3) Outside New York State	37,700	38,208	42,023	44,748	48,468
B. Percentage of Circulation					
(1) Within New York City	10.40%	6.70%	6.40%	5.90%	4.90%
(2) Within New York State	17.36%	17.20%	16.40%	16.20%	16.10%
(3) Outside New York State	82.64%	82.80%	83.60%	83.80%	83.90%

V. Harper's Bazaar

A. Circulation					
(1) Within New York City	41,028	39,604	41,053	40,241	38,716
(2) Within New York State	51,986	51,106	52,201	51,196	50,948
(3) Outside New York State	290,026	298,933	307,807	311,894	300,415
B. Percentage of Circulation					
(1) Within New York City	10.90%	10.40%	9.99%	9.78%	9.76%
(2) Within New York State	15.20%	14.60%	14.50%	14.10%	14.50%
(3) Outside New York State	84.80%	85.40%	85.50%	85.90%	85.50%

VI. Town & Country

A. Circulation					
(1) Within New York City	9,090	9,265	8,893	8,712	8,314
(2) Within New York State	10,986	11,663	12,488	11,615	11,059
(3) Outside New York State	43,671	52,422	55,291	55,138	55,946
B. Percentage of Circulation					
(1) Within New York City	14.10%	14.40%	13.90%	12.80%	11.90%
(2) Within New York State	20.10%	18.20%	18.70%	17.40%	16.50%
(3) Outside New York State	79.90%	81.80%	81.30%	82.60%	83.50%

	1950	1951	1952	1953	1954
VII. House Beautiful					
A. Circulation					
(1) Within New York City	37,982	38,872	39,023	39,238	42,076
(2) Within New York State	71,861	68,801	70,147	69,645	72,207
(3) Outside New York State	489,551	514,249	539,826	541,275	550,270
B. Percentage of Circulation					
(1) Within New York City	6.80%	6.50%	5.90%	5.87%	5.99%
(2) Within New York State	12.80%	11.80%	11.50%	11.40%	11.60%
(3) Outside New York State	87.20%	88.20%	88.50%	88.60%	88.40%
VIII. Sports Afield					
A Circulation					
(1) Within New York City	—	—	—	10,008	10,326
(2) Within New York State	—	—	—	55,623	57,587
(3) Outside New York State	—	—	—	783,338	800,635
B. Percentage of Circulation					
(1) Within New York City	—	—	—	1.16%	1.12%
(2) Within New York State	—	—	—	6.63%	6.71%
(3) Outside New York State	—	—	—	93.37%	93.29%
IX. Totals for Eight Magazines					
A. Circulation					
(1) Within New York City	334,592	335,718	320,952	333,902	298,910
(2) Within New York State	689,126	705,964	722,337	775,063	721,164
(3) Outside New York State	5,366,465	5,492,139	5,510,078	6,357,907	5,931,639
B. Percentage of Circulation					
(1) Within New York City	5.53%	5.42%	5.15%	4.69%	4.49%
(2) Within New York State	11.38%	11.39%	11.59%	10.87%	10.84%
(3) Outside New York State	88.62%	88.61%	88.41%	89.13%	89.16%
C. Percentage of gross advertising receipts upon which City has imposed tax	61.65%	71.54%	73.73%	66.78%	70.63%

APPENDIX B

Time, Incorporated, Publications*

Circulation Figures and Percentages of Gross Receipts Taxed by New York City

	1948	1949	1950	1951	1952	1953	1954	1955	1956
I. TIME (Domestic Edition)									
A. Circulation									
(1) Within New York City	90,600	82,300	81,100	81,400	84,700	86,300	101,100	102,800	102,100
(2) Within New York State	177,900	170,300	175,300	177,700	184,400	191,400	212,700	219,900	231,100
(3) Outside New York State	1,469,600	1,383,200	1,414,100	1,483,900	1,509,500	1,569,500	1,659,600	1,720,100	1,811,800
B. Percentage of Circulation									
(1) Within New York City	5.5%	5.3%	5.1%	4.9%	5.0%	4.9%	5.4%	5.3%	5.0%
(2) Within New York State	10.80%	10.96%	11.03%	10.69%	10.89%	10.87%	11.36%	11.33%	11.31%
(3) Outside New York State	89.20%	89.04%	88.97%	89.31%	89.11%	89.13%	88.64%	88.67%	88.69%
C. Percentage of gross advertising receipts upon which City has imposed tax	41.6%	40.2%	40.0%	39.5%	39.2%	43.5%	44.9%	44.5%	44.4%
II. LIFE (Domestic Edition)									
A. Circulation									
(1) Within New York City	343,200	363,400	323,000	306,400	290,300	307,200	310,100	355,800	332,800
(2) Within New York State	668,600	693,900	659,700	635,100	623,700	642,300	652,300	711,600	715,000
(3) Outside New York State	4,694,000	4,729,500	4,635,100	4,740,100	4,752,000	4,943,600	4,985,500	5,027,000	5,023,500
B. Percentage of Circulation									
(1) Within New York City	6.4%	6.7%	6.1%	5.7%	5.4%	5.5%	5.5%	6.2%	5.8%
(2) Within New York State	12.47%	12.79%	12.46%	11.81%	11.60%	11.50%	11.57%	12.40%	12.46%
(3) Outside New York State	87.53%	87.21%	87.54%	88.19%	88.40%	88.50%	88.43%	87.60%	87.54%
C. Percentage of gross advertising receipts upon which City has imposed tax	53.4%	51.8%	48.0%	47.4%	47.2%	48.1%	46.5%	45.3%	46.4%
III. FORTUNE									
A. Circulation									
(1) Within New York City	18,100	17,900	17,300	16,200	16,500	16,300	17,100	17,400	16,500
(2) Within New York State	31,800	31,800	32,200	29,900	31,400	31,100	32,800	34,600	36,900
(3) Outside New York State	212,800	213,100	218,300	212,200	218,200	212,300	218,900	232,600	247,400
B. Percentage of Circulation									
(1) Within New York City	7.4%	7.3%	6.9%	6.7%	6.6%	6.6%	6.8%	6.5%	5.8%
(2) Within New York State	13.00%	12.99%	12.87%	12.36%	12.57%	12.79%	13.03%	12.96%	12.97%
(3) Outside New York State	87.00%	87.01%	87.13%	87.64%	87.43%	87.21%	86.97%	87.04%	87.03%
C. Percentage of gross advertising receipts upon which City has imposed tax	40.4%	36.6%	37.6%	38.2%	37.2%	37.9%	40.8%	43.8%	42.5%

* Information as to the application of the City tax to the relatively smaller advertising revenues of other Time, Incorporated, publications, including the foreign editions of TIME and LIFE, has been omitted.

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Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

PETITION FOR REHEARING

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Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

PETITION FOR REHEARING

Appellant prays that this Court grant rehearing of its order of April 28, 1958, dismissing the appeal herein on the authority of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

Reasons for Granting Rehearing

The Court has noted probable jurisdiction in *Northwestern States Portland Cement Co.* v. *Minnesota*, No. 606 this Term, and has granted certiorari in *Williams* v. *Stockham Valves and Fittings, Inc.*, No. 763 this Term (a Georgia case). Both of these cases, scheduled for argument successively at the next Term, involve the validity under the commerce clause of state taxes upon the net income from

interstate commerce of foreign corporations. The problems in these cases have a direct bearing upon the issues in the instant case. For this substantial reason, we submit that the Court should

(1) grant a rehearing and note probable jurisdiction in the present case to set the stage for a fuller exploration of the commerce questions already before the Court, or, alternatively,

(2) postpone final disposition of this petition for rehearing until after the decisions in Nos. 606 and 763.

Either of these alternatives will insure that the final disposition of the instant case will be consistent with the cognate rulings in the Minnesota and Georgia cases.

If this Court ultimately sustains the state income-taxing power asserted in the pending cases, the existence of a potential multiple burden upon the present appellant becomes inescapably clear. It will be obvious following such a decision that this appellant is exposed to taxes upon its advertising receipts in all the states where its salesmen regularly and intensively solicit advertising and where advertising sales offices are maintained by or for it.

This substantial possibility of multiple taxation if New York City's unapportioned tax is allowed to stand, turning upon the outcome of the two cases awaiting argument, is a matter of the highest significance in view of the fact that the dismissal of the appeal herein was grounded squarely and exclusively upon *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250. For the result in *Western Live Stock* was determined almost entirely by this Court's conclusion that there was, in the factual and legal context of that case, no threat of a multiple tax burden. See 303 U. S. at 255-7, 258, 259, 260-1. Such a conclusion, should

the Court uphold the Georgia and Minnesota taxes now before it, will be impossible in this case.

This is true, of course, despite the fact that the taxes in the two pending cases are income rather than privilege or franchise taxes. This Court's decisions leave no doubt that (1) a multiple burden may arise from taxes of different kinds, even upon different taxpayers, and (2) such forbidden burdens are present whenever another state might tax a related aspect of the commerce if it were not for the protection of the commerce clause:

(1) The vice condemned in *Western Live Stock* as characteristic of those taxes measured by gross receipts from interstate commerce which have been held unconstitutional "is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." 303 U. S. at 255-6. None of the numerous decisions cited in *Western Live Stock* (pp. 255-57) for the "multiple burden" doctrine, and none of the subsequent decisions holding taxes invalid on this ground, indicates that this evil disappears when the states in which the business is conducted vary their taxes on the commerce so as to reach net income on the one hand, or gross receipts on the other, or because one state calls its levy a franchise tax, a second calls it a privilege tax, and a third uses some other label. On the contrary, it seems clear under this doctrine that a gross receipts tax may be invalid because another state could levy a sales tax or use tax upon the same transaction. See Mr. Justice Rutledge concurring in *Freeman* v. *Hewit*, 329 U. S. 249, 283 and n. 46, and in *International Harvester*

Co. v. *Dept. of Treasury*, 322 U. S. 340, 359. Indeed, the tax may be invalid because another state could levy a tax upon a different, though related, aspect of the commerce, falling upon a different taxpayer. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 429; see discussion of *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650, in *Western Live Stock*, 303 U. S. at 260-61, as analyzed in our Statement as to Jurisdiction, pp. 18-19.

(2) A multiple burden may arise from a tax which could be levied by another state only if there were no interstate commerce clause; in such case the commerce clause operates to free the business or transaction from tax in either state. *Western Live Stock*, 303 U. S. at 260; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438-39; see discussion of the *Adams* case by Mr. Justice Rutledge, concurring in *Freeman* v. *Hewit*, 329 U. S. 249, 274-76. Because this is so, there can be no doubt of this appellant's exposure to potential multiple burdens if the Court affirms the income-taxing power in the Minnesota (No. 606) and Georgia (No. 763) cases awaiting argument. For such affirmance will mean that there are neither commerce nor due process objections to the taxes involved (both objections are made by the taxpayers and were sustained by the state court in the Georgia case). And elimination of the due process problem will leave it clear that, "without the commerce clause" (*Western Live Stock*, 303 U. S. at 260), *privilege taxes* as well as income taxes would be leviable on similar facts by states other than New York upon the advertising receipts of this appellant.

We submit, in short, that, if the Minnesota and Georgia taxes now before the Court are upheld, thus exposing this appellant to repetitive taxes in all the states where it regularly and intensively solicits advertising, the unapportioned

New York City privilege tax on this appellant's gross advertising receipts must be held invalid under the multiple-burden doctrine as expounded by this Court. This is a crucial distinction from *Western Live Stock* for reasons which may be quickly summarized:

(1) There were no allegations in *Western Live Stock* of the pertinent facts established in this case—that appellant has offices outside New York and has salesmen who regularly and systematically solicit advertising in other states. In *Western Live Stock* the lack of a possible multiple burden was predicated solely upon the absence in states other than New Mexico of any "dominion over the magazine or its subscribers" (303 U. S. at 260), and was not based upon any consideration of the effect of advertising solicitation in other states.

(2) The problem of multiple burdens was the only ground articulated in *Western Live Stock* (303 U. S. at 260) for holding that advertising receipts of interstate magazines could be taxed although radio advertising receipts, deriving from a substantially identical service, could not. *Fisher's Blend Station* v. *State Tax Commission, supra.* This is the only distinction between the two cases which has ever been suggested anywhere. If, as we believe, the distinction will be untenable for national magazines like appellant's should this Court sustain the pending Georgia and Minnesota taxes, the instant case perpetuates an anomaly which imposes an unwarranted burden upon magazines or grants an unmerited advantage to radio.

There is, in sum, a pressing need for clarification of the meaning and extent of the multiple-burden principle. The

need is sharpened by the potential creation of further inconsistencies following the decisions in the pending Minnesota and Georgia cases.

What we are urging, then, is that this appeal not be dismissed irrevocably while closely interrelated problems, which may well affect or be affected by the outcome here, are awaiting resolution by the Court. Delay for this sound reason can work no prejudice against New York City; the taxes in issue have been paid and this suit involves only refund claims. On the other hand, there is the threat of prejudice, not merely to this appellant but to the course of orderly adjudication in an area of intertwining complexities, resulting from summary rejection of this appeal while the Minnesota and Georgia cases await argument and decision.

CONCLUSION

For the reasons stated above, and in appellant's jurisdictional statement and reply brief, it is respectfully urged that rehearing be granted and probable jurisdiction noted, or that final decision on this petition be postponed pending the outcome of *Northwestern States Portland Cement Co.* v. *Minnesota*, No. 606 this Term, and *Williams* v. *Stockham Valves and Fittings, Inc.*, No. 763 this Term.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Counsel for Appellant